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1951

THE

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AND

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1951

MEMORANDA

1951.

Jan. 11. THE RIGHT HON. SIR ALFRED TOWNSEND BUCKNILL, O.B.E., *a Lord Justice of Appeal, retired.*

Jan. 15. THE HON. SIR FRANCIS LORD CHARLTON HODSON, M.C., *a Justice of His Majesty's High Court of Justice, Probate, Divorce, and Admiralty Division, was appointed to be one of the Lords Justices of Appeal in succession to Lord Justice Bucknill, retired.*

Jan. 15. SEYMOUR EDWARD KARMINSKI, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in the place of Mr. Justice Hodson, and was afterwards knighted.*

Apr. 6. THE RIGHT HON. LORD MACDERMOTT OF BELMONT, *a Lord of Appeal in Ordinary was appointed Lord Chief Justice of Northern Ireland, in succession to Sir James Andrews, deceased.*

Apr. 23. *This day* SIR GEORGE BRANSON, *sometime a Justice of His Majesty's High Court of Justice, King's Bench Division, died, aged* 79.

Apr. 23. THE RIGHT HON. SIR CYRIL ASQUITH, *a Lord Justice of Appeal, was appointed to be a Lord of Appeal in Ordinary, in succession to The Right Hon. Lord McDermott, and was granted the dignity of Baron of the United Kingdom, by the name, style and title of Baron Asquith of Bishopstone in the County of Sussex.*

Apr. 27. THE HON. SIR JOHN WILLIAM MORRIS, C.B.E., M.C., *a Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal, in succession to The Right Hon. Lord Asquith.*

Apr. 28. THE RIGHT HON. SIR FRANK SOSKICE, K.C., *Solicitor-General, was appointed Attorney-General in place of The Right Hon. Sir Hartley William Shawcross, K.C., who was appointed President of the Board of Trade.*

Apr. 28. ARWYN LYNN UNGOED-THOMAS, ESQ., K.C., *was appointed Solicitor-General in the place of the Right Hon. Sir Frank Soskice, K.C., and was afterwards knighted.*

May 9. SIR GONNE ST. CLAIR PILCHER, M.C., *a Justice of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division was transferred to the King's Bench Division in the place of Mr. Justice Morris.*

May 9. CECIL ROBERT HAVERS, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in the place of Mr. Justice Pilcher, and was afterwards knighted.*

Sept. 30. THE RIGHT HON. SIR TRAVERS HUMPHREYS, *a Justice of His Majesty's High Court of Justice, King's Bench Division, retired.*

Oct. 1. Colin Hargreaves Pearson, Esq., C.B.E., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Humphreys, retired.*

Oct. 30. The Right Hon. Lord Simonds of Sparsholt, *received the Great Seal and took the oath of Office as Lord High Chancellor of Great Britain, in succession to the Right Hon. Viscount Jowitt.*

Nov. 3. Lionel Frederick Heald, Esq., K.C., *was appointed Attorney-General in the place of The Right Hon. Sir Frank Soskice, K.C., and was afterwards knighted.*

Nov. 3. Reginald Edward Manningham-Buller, Esq., K.C., *was appointed Solicitor-General in the place of Sir Arwyn Lynn Ungoed-Thomas, K.C., and was afterwards knighted.*

Nov. 12. The Right Hon. Sir Lionel Leonard Cohen, *a Lord Justice of Appeal, was appointed to be a Lord of Appeal in Ordinary in the place of The Right Hon. Lord Simonds, and was granted the dignity of a Baron of the United Kingdom by the name, style and title of Baron Cohen of Walmer in the County of Kent.*

Nov. 7. The Hon. Sir Charles Robert Ritchie Romer, *a Justice of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal in succession to The Right Hon. Lord Cohen.*

Nov. 17. Gerald Ritchie Upjohn, Esq., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Romer, and was afterwards knighted.*

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

[PRIVY COUNCIL]

J. C.*

1950

June 14;
July 18.

KANNANGARA ARATCHIGE DHARMASENA Appellant;

AND

THE KING . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Criminal law—Ceylon—Charge of criminal conspiracy against two persons—Both convicted—Appeal—Conviction of one quashed and her retrial ordered—Acquitted at retrial—Impossible result where conspiracy is concerned—Imperative that both should have been retried at same time—Acquittal at retrial treated as disposing of charge of conspiracy against both.

After the appellant and S., who were tried together before a judge and jury on, inter alia, a joint charge of conspiracy to murder, had both been found guilty, the conviction of S. was quashed on appeal and a new trial ordered in her case. At the new trial, before another jury, S. was acquitted of the charge of conspiracy to murder.

Held, that since where two persons have been tried together on a charge of conspiracy the only possible verdict is either that both are, or neither is, guilty, an order for the retrial of one makes it

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* *Present*: Lord Porter, Lord Oaksey, Lord Radcliffe, Sir John Beaumont and Sir Lionel Leach.

J. C.

1950

KANNANGARA ARATCHIGE DHARMASENA
v.
THE KING.

imperative that the other should also be retried at the same time so that both may be convicted or acquitted together. In the present case, in as much as S. had been found not guilty of conspiracy, the proper course was to treat her acquittal as a disposal of the charge of conspiracy and as involving the acquittal of the appellant also on that charge.

Judgment of the Court of Criminal Appeal of Ceylon affirmed in the result.

APPEAL (No. 34 of 1949), by special leave, from a judgment of the Court of Criminal Appeal of Ceylon (March 26, 1949) dismissing the appellant's appeal against his conviction at the Sessions of the Supreme Court of Ceylon sitting at Colombo (February 3, 1949) on two charges, namely, conspiracy to commit murder, and murder.

The appellant was charged and tried together with one Beatrice Maude de Silva Seneviratne on an indictment dated June 18, 1949, containing three counts in the following terms:—

> (1) That between November 1 and 8, 1947, at Nugegoda and Kotahena in the district of Colombo, you did agree to commit or act together with a common purpose for or in committing an offence to wit the murder of one Govipolagodage Dionysius de Silva Seneviratne of No. 107, College Street, Kotahena, and that you have thereby committed the offence of conspiracy to commit murder in consequence of which conspiracy the said offence of murder was committed; and that you have thereby committed an offence punishable under s. 113B read with ss. 296 and 102 of the Penal Code.
>
> (2) That on or about November 7, 1947, at Kotahena in the district of Colombo, and in the course of the same transaction as set out in count (1) above, you Kannangara Aratchige Dharmasena, alias Baas, did commit murder by causing the death of the said Govipolagodage Dionysius de Silva Seneviratne; and that you have thereby committed an offence punishable under s. 296 of the Penal Code.
>
> (3) That between the dates mentioned in count (1) above, you Beatrice Maude de Silva Seneviratne did abet the said Kannangara Aratchige Dharmasena, alias Baas, the first accused, in the commission of the offence set out in count (2) above, which said offence was committed in consequence of such abetment; and that you have thereby committed an offence punishable under s. 296 read with s. 102 of the Penal Code.

Govipolagodage Dionysius de Silva Seneviratne, who undoubtedly was murdered by someone, was the husband of the second accused.

The trial took place before a commissioner and jury. The jury returned a unanimous verdict of guilty against both the accused on the first count, and of guilty of committing murder against the appellant on the second count. No verdict was returned on the third count. Both accused were sentenced to death.

On appeal the Court of Criminal Appeal (Canekeratne J. (President), Dias and Windham JJ.) quashed the conviction of Mrs. Seneviratne and granted a new trial in her case. They dismissed both appeals by the appellant, holding that there was ample evidence to establish his guilt.

At the new trial of the second accused the jury, on the judge's invitation, stopped the case and acquitted her on the charge of conspiracy.

1950. June 7, 8, 12, 13 and 14. *Granville Sharp K.C.*, *Dingle Foot* and *Millner* for the appellant.

Gahan and *Le Quesne* for the respondent.

June 14. Lord Porter announced that their Lordships would humbly advise His Majesty that the appeal should be dismissed, and that they would give their reasons later.

July 18. The reasons of their Lordships for dismissing the appeal were delivered by Lord Porter, who stated the terms of the counts and continued: Before the trial opened, counsel for each of the accused made an application that their respective clients should be tried separately, claiming that they would be seriously prejudiced if tried together. The application, however, was refused. As a result of this refusal the two accused persons were tried together both on the count for conspiracy and on the two separate individual counts. The justification for this action is to be found in ss. 180 and 184 of the Criminal Procedure Code of Ceylon. Their terms are as follows:—

> " Section 180. (1) If in one series of acts so connected " together as to form the same transaction more offences than " one are committed by the same person he may be charged " with and tried at one trial for every such offence, and in " trials before the Supreme Court or a District Court such " charges may be included in one and the same indictment.
>
> " (2) If the acts alleged constitute an offence falling within " two or more separate definitions of any law in force for the " time being by which offences are defined or punished the " person accused of them may be charged with and tried at " one trial for each such offences, and in trials before the " Supreme Court or a District Court such charges may be " included in one and the same indictment.
>
> " (3) If several acts, of which one or more than one would " by itself or themselves constitute an offence, constitute

"when combined a different offence the person accused of "them may be charged with and tried at one trial for the "offence constituted by such acts when combined and for any "offence constituted by any one or more of such acts, and "in trials before the Supreme Court or a District Court such "charges may be included in one and the same indictment.

"(4) Nothing contained in this section shall affect "section 67 of the Penal Code."

"Section 184. When more persons than one are accused "of jointly committing the same offence or of different "offences committed in the same transaction or when one "person is accused of committing any offence and another "of abetment of or attempt to commit such offence, they may "be charged and tried together or separately as the court "thinks fit; and the provisions contained in the former part "of this Chapter shall apply to all such charges."

It was at one time contended on behalf of the appellant that the refusal by the learned judge to separate the trials of the two accused was erroneous in law, gravely prejudicial to the appellant and amounted to a substantial miscarriage of justice. It was, however, afterwards conceded that this contention could not prevail in face of the decision in *Babulal Choukhani* v. *The King-Emperor* (1), where their Lordships held that the time at which it falls to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled so as to enable persons accused of different offences to be charged and tried together as provided by s. 239 of the Indian Code of Criminal Procedure (which is identical with s. 184 of the Ceylon Act) is the time when the accusation is made, and not when the trial is concluded and the result known. The charges, it was held, have to be framed for better or worse at an early stage of the proceedings, and it would be paradoxical if it could not be determined until the end of the trial whether it was legal or illegal. It was for the judge bearing these considerations in mind to use his discretion.

In the light of this decision the appellant's advisers were plainly right in not persisting in the contention that the two accused were improperly tried together on the three charges framed. It was, however, further urged that the indictment in fact charged only the crime of conspiracy and merely added murder as part of the conspiracy but not as a separate charge. This result was said to follow from the insertion in count (2) of the words "in the course of the same transaction as set out in "count (1)". Their Lordships do not find themselves able to accept this view. In their opinion the addition of these words

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(1) (1938) L. R. 65 I. A. 158.

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does not limit the charge preferred to an allegation of conspiracy only; they are necessary in order to show that the three offences alleged were committed in the course of the same transaction. Nevertheless they still leave a separate and independent charge of murder by the appellant. This view is supported by a reference to s. 167, sub-s. 4, of the Code which enacts that " The law and " section of the law under which the offence said to have been " committed is punishable shall be mentioned in the charge." If, then, count (2) charged or intended to charge conspiracy it must needs contain a reference to s. 113B of the Penal Code, whereas s. 296, which prescribes the punishment for murder, is alone referred to. So far, therefore, as this technical objection is concerned their Lordships reject the appellant's argument.

The trial took place before a judge and jury. In his summing-up the learned judge directed the jury on the charges of conspiracy and of murder but told them that the accusation of abetment was so involved with that of conspiracy that unless they found the conspiracy proved they should acquit Mrs. Seneviratne of abetment also. The jury in their verdict found both the accused guilty of conspiracy to murder and the appellant guilty of murder, but in accordance with the judge's direction made no finding as to abetment and that charge may now be disregarded.

From this finding both appealed to the Court of Criminal Appeal and that court quashed the conviction of Mrs. Seneviratne and granted a new trial in her case under the power contained in s. 5, sub-s. 2, of the Criminal Appeal Ordinance of Ceylon, No. 23 of 1938. The exact method to be adopted in exercising the power given in this section is not very clear, but it seems that the correct procedure under the Ordinance is to quash the conviction. A quashed conviction, however, does not acquit the appellant of the crime charged. It merely makes the previous conviction abortive. If it is intended to direct a judgment of acquittal to be entered it must be done in terms. If this step is not taken, a new trial may be ordered though the conviction has been quashed, as has been done in this case.

Whilst the Court of Criminal Appeal so treated the case of Mrs. Seneviratne, they dismissed both appeals by the appellant, saying that even without the evidence of one witness, namely, Alice Nona, whose testimony will be referred to later, there was ample evidence to establish the guilt of the appellant.

As a result of the order of the Court of Criminal Appeal Mrs. Seneviratne was re-tried, and at the second trial Alice Nona, who was an important, if not vital, witness for the prosecution, proved so unreliable that the jury stopped the case on the invitation of the learned judge who tried it and found the accused woman not guilty. After this verdict the position was that of

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two conspirators one had been found guilty by one jury and the other acquitted by another.

In their Lordships' opinion this is an impossible result where conspiracy is concerned. It is well-established law that if two persons are accused of conspiracy and one is acquitted the other must also escape condemnation. Two at least are required to commit the crime of conspiracy; one alone cannot do so. In the present case the only conspirators suggested were the two accused persons, and there were no others, known or unknown, who might have participated in the crime. It is true that one conspirator may be tried and convicted in the absence of his companions in crime: *Reg.* v. *Ahearne* (2), but where two have been tried together so that the only possible verdict is either that both are, or neither is, guilty, an order for the retrial of one makes it imperative that the other should also be retried. In their Lordships' opinion, therefore, if two persons are accused of a criminal conspiracy and convicted, and on appeal one can be, and is, sent for retrial, the other should be sent at the same time for retrial also on that charge so that both may be convicted or acquitted together. In the present case in as much as Mrs. Seneviratne has been found not guilty of conspiracy, their Lordships think the proper course is to treat her acquittal as a disposal of the charge of conspiracy and as involving the acquittal of the appellant also on that charge. The appeal against conviction on that count should accordingly be allowed.

But though the appellant's conviction on the charge of conspiracy should, in their Lordships' view, have been quashed together with that of his alleged co-conspirator and though he, like her, should have been sent for retrial and must now be acquitted, yet there remains the question whether he should also have been acquitted of the charge of murder. A number of grounds on which it is contended that the appellant suffered a miscarriage of justice have been put forward, but in substance they may now be reduced to two: (1) that the jury must have been unduly prejudiced against him by the questions put to the other accused, and (2) that if it had not been so prejudiced the jury might well have acquitted him. Undoubtedly there were irregularities in the trial for conspiracy which the Court of Criminal Appeal in Ceylon held to have been unduly prejudicial to the accused woman. In their judgment they say:—

> "It is, of course, always proper for a judge—he has the "power and it is his duty at times—to put such additional "questions to the witnesses as seem to him desirable to elicit "the truth. The part which a judge ought to take while "witnesses are giving their evidence must, of course, rest with

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(2) (1852) 6 Cox C. C. 6.

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> "his discretion. But with the utmost respect to the judge, "it was, I think, unfortunate that he took so large a part "in examining the appellant. Though he was endeavouring "to ascertain the truth, in the manner which at the moment "seemed to him most convenient, there was a tendency to "press the appellant on more than one occasion. The "importance and power of his office, and the theory and rule "requiring impartial conduct on his part, make his slightest "action of great weight with the jury. If he takes upon "himself the burden of the cross-examination of the accused, "when the government is represented by competent counsel, "and conducts the examination in a manner hostile to the "accused and suggesting that he is satisfied of the guilt of the "accused, as some of the questions do, the impression would "probably be produced on the minds of the jury that the "judge was of the fixed opinion that the accused was guilty "and should be convicted. This would not be fair to the "accused, for she is entitled to the benefit of the presumption "of innocence by both judge and jury till her guilt is proved. "If the jury is inadvertently led to believe that the judge does "not regard that presumption, they may also disregard it."

Strictly, of course, this criticism is concerned with the case against Mrs. Seneviratne alone, but a finding against her in a case of conspiracy is bound to influence to some extent the attitude of the jury towards the appellant. Moreover, the evidence of Alice Nona purported to implicate him as well as her in the alleged conspiracy. Bearing these circumstances in mind, their Lordships have to decide whether the appellant's conviction for murder should or should not be affirmed and to determine the principles which should guide their decision. The principles on which the Board must be guided in reaching a conclusion on this matter are that they must keep in mind the provisions of s. 5, sub-s. 1, of the Ordinance of 1938, which declares:—

> "The Court of Criminal Appeal on any such appeal "against conviction shall allow the appeal if they think that "the verdict of the jury should be set aside on the ground "that it is unreasonable or cannot be supported having regard "to the evidence, or that the judgment of the court before "which the appellant was convicted should be set aside on "the ground of a wrong decision of any question of law or "that on any ground there was a miscarriage of justice, and "in any other case shall dismiss the appeal:
>
> "Provided that the court may, notwithstanding that they "are of opinion that the point raised in the appeal might be "decided in favour of the appellant, dismiss the appeal if "they consider that no substantial miscarriage of justice has "actually occurred."

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and must bear in mind that they are not themselves a Court of Criminal Appeal.

In determining what amounts to a serious miscarriage of justice their Lordships have the guidance of English decisions on wording which is the same as, and is obviously copied from, s. 4, sub-s. 1, of the English Act of 1907. For the present purpose it is enough to refer to *Rex* v. *Haddy* (3), which was approved in the House of Lords in *Stirland* v. *Director of Public Prosecutions* (4). Viscount Simon's words in the latter case sum up the matter. He says (5):—

> "Apart altogether from the impeached questions (which "the Common Serjeant in his summing-up advised the jury "entirely to disregard), there was an overwhelming case "proved against the appellant. When the transcript is "examined it is evident that no reasonable jury, after a proper "summing-up, could have failed to convict the appellant on "the rest of the evidence to which no objection could be "taken. There was, therefore, no miscarriage of justice, "and this is the proper test to determine whether the proviso "to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should "be applied. The passage in *Woolmington* v. *Director of* "*Public Prosecutions* (6), where Viscount Sankey L.C. "observed that in that case, if the jury had been properly "directed it could not be affirmed that they would have "'inevitably' come to the same conclusion should be under-"stood as applying this test. A perverse jury might "conceivably announce a verdict of acquittal in the teeth "of all the evidence, but the provision that the Court of "Criminal Appeal may dismiss the appeal if they consider "that no substantial miscarriage of justice has actually "occurred in convicting the accused assumes a situation "where a reasonable jury, after being properly directed, "would, on the evidence properly admissible, without doubt "convict. That assumption, as the Court of Criminal Appeal "intimated, may be safely made in the present case. The "Court of Criminal Appeal has recently in *Rex* v. *Haddy* (3), "correctly interpreted s. 4, sub-s. 1, of the Criminal Appeal "Act and the observation above quoted from *Woolmington's* "case (6) in exactly this sense."

What, then, their Lordships have to determine is whether a reasonable jury, properly directed, would on the evidence adduced have found the appellant guilty of murder. That there is ample, and more than ample, evidence on which a jury could do so is undoubted. Some one murdered Govipolagodage Seneviratne in his own house between 9 o'clock and 9.30 a.m. on November 7, 1947. The post-mortem revealed that he had died as the result of a violent attack with a sharp instrument with which he had been struck with force a number of times, and death was due to hæmorrhage and shock from multiple incised wounds in the neck.

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(3) [1944] 1 K. B. 442.
(4) [1944] A. C. 315.
(5) Ibid. 320.
(6) [1935] A. C. 462, 482, 483.

The evidence against the appellant on this part of the case is perhaps most conveniently set out in tabulated form.

(1) Three witnesses, who had ample opportunities of observing him, identified him as having been near the spot on the day in question at the time when the murder must have taken place, and said that he had come from the back compound of the dead man's house.

(2) According to their evidence he had covered his head with a sarong belonging to the deceased's son and was carrying a handbag and knife. When challenged, he threatened one of these witnesses with the knife.

(3) Another of these witnesses tried to stop him, but he escaped, dropped the knife and handbag in a rampe bush and, throwing off the sarong, ran towards Alwis Street. The knife and handbag were afterwards found by the police in this spot.

(4) A fourth witness, who was repairing the roof of a house in Alwis Place, saw the appellant run under the portico of the house where he was working and force his way through the zinc sheets of a boundary fence. He afterwards found a coat on the ground below the spot at which he was working. This witness, like the others, identified the appellant at an identification parade held before the learned magistrate. It is true that one witness who said he saw someone running along Alwis Place failed to identify the appellant as the runner, but that failure is of little importance in the face of the confident identification of the other four.

(5) The knife, bag, sarong and coat were all imbued with human blood, and to the knife human hair of the colour and texture of the dead man was found adhering.

(6) About 3 to 3.30 on the afternoon of November 7 the appellant came to the shop at Nugegoda which is occupied by a carpenter and by a smith. He brought with him a block of wood, a bolt of iron with a nut underneath and a piece of iron which had been flattened for a knife. He also brought two washers and a nut. He first asked the carpenter to make him a herb cutter which he required that day. The carpenter referred him to the blacksmith, who rejected the knife as unsuitable because it was of iron whereas it should have been of steel, and the wood as having marks on it made by the cutting knife. The blacksmith was unable to finish the work that day, but finished the cutter next morning after fitting to it a fresh knife and a fresh piece of wood. The appellant, however, had been arrested meanwhile and the knife and its accompaniments were handed over to the police.

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The articles from the compound at the deceased's house and the other articles mentioned above were sent to the government analyst, and these included the knife recovered from the rampe bush and the bolt which the appellant had brought to the blacksmith's shop. At the trial this witness was asked to reconstruct the herb cutter with the knife which had been recovered instead of that made by the blacksmith. According to his evidence the bolt would leave two roughly circular marks on either side of any piece of metal attached to it, and the recovered knife had in fact two circular marks, one on each side, which correspond in shape and area to the two marks that would be produced by the inner side of the bolt. From their appearance the inference therefore was justified that the recovered knife must have been attached to this bolt for some time. The appellant urges in answer that another knife had been found lying on the table on his premises to which the operating knife of a herb cutter would be attached, and his wife stated that the knife so found was the only one which they possessed and was that actually in use by the appellant and, further, that some difficulty was experienced in fixing the knife to the bolt.

The first of these points is disposed of by the evidence of the government analyst, who says in terms that that knife could never have been fitted to the herb cutter, and the second is only true to the extent that there was a small projection half-way down the thread of the bolt which necessitated the use of a little force if the screw was to go beyond it—an eventuality which was by no means certain. But in any case the witness had no doubt that the knife used to kill the deceased fitted into the bolt which the accused took to the blacksmith.

(7) The appellant was examined by a doctor on the day on which the murder was committed and was found to have an oblique incised wound over the inner prominence of his right ankle and an abrasion. These injuries could not have been caused by a dog bite, as was suggested on behalf of the appellant, or by a knife, but were consistent with injuries caused by the appellant drawing his leg upward when passing through a fence constructed of galvanized iron or zinc sheets with sharp edges.

(8) On the morning of the murder the appellant borrowed an umbrella from a neighbour between the hours of 7.30 and 8 a.m. The umbrella was never returned, but according to the police evidence an umbrella was found by 1.30 p.m. on the day of the murder leaning against the wall near a pool of blood and was identified as his by the neighbour. The only answer made on behalf of the accused was an assertion by his wife that the police had conspired to entrap her husband, and to bring the conspiracy to a successful conclusion had removed the umbrella from his house when they came to arrest him. The lady's evidence, however, as

to the knife and on other matters, as appears below, is inconsistent with the established evidence and could not be accepted.

(9) Finally, the accused man did not himself give evidence at the trial as to his movements on the day in question, though his wife was called on his behalf and testified that with the exception of a brief and immaterial interval he was at home all day. This evidence is not only in conflict with that given by the four witnesses referred to above but also with that of the carpenter and blacksmith who spoke to his having visited them that afternoon.

On this evidence it is plain that there was ample material on which a jury could convict the appellant. But it is said that as a result of the joint trial of the two accused he was seriously prejudiced in the eyes of the jury by the undue intervention of the learned commissioner in the examination of Mrs. Seneviratne and his dramatic reconstruction of the steps taken which led up to the crime and which the evidence does not warrant. In particular, it was pointed out that unless there was a conspiracy, no motive for the murder by the accused of a personal friend had been established; that in the summing-up the presence of the accused on the premises on the fatal day had been assumed; that the evidence of Alice Nona could not be, and at the second trial was not, accepted, and that the suggestion that the coat and sandals found on the spot were those of the appellant was unwarranted.

Though, as the Court of Criminal Appeal have found and their Lordships have accepted, there were irregularities in the trial on the conspiracy charge, the summing-up against this prisoner is plainly separated from the joint charge. Moreover, though short, it impresses on the jury the necessity for the prosecution to prove their case. It puts fully and carefully before them the evidence for the appellant and calls their attention to, and carefully reiterates, his wife's evidence on his behalf. He had already warned them that Alice Nona might be a conspirator, and on this part of the case he places no reliance on, and indeed does not base any argument on, her evidence. So, too, the coat and sandals are not suggested as incriminating the accused man. It is true that the jury were not warned in terms that without a finding of conspiracy no motive for the crime was proved, but motive is only an element, and is not a vital element in the case where the evidence of the commission of the crime is clear. Moreover, when dealing with the second count of the indictment, the learned judge nowhere suggests that any motive had been shown to exist; the facts given in evidence alone are relied on. Furthermore, the appeal with which their Lordships are concerned is not brought from the trial by judge and jury alone. Intervening is the judgment of the Court of Criminal Appeal, who confirmed the verdict

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of the jury. "Even without the evidence of Alice Nona", they say, "there was ample evidence in the case to establish the guilt "of the first accused". With this observation their Lordships agree, and notwithstanding such irregularities as occurred in the trial for conspiracy, they are not persuaded that any substantial miscarriage of justice has occurred. Rather they think that a reasonable jury, properly directed, would have found the appellant guilty of the crime of murder. It may be useful to reiterate what was said as to the functions of the Board and the principles on which their Lordships act the language used in *Renouf* v. *Attorney-General for Jersey* (7). The wording is:—

> "It may be useful to repeat that the Board has always "treated applications for leave to appeal, and the hearing "of criminal appeals so admitted, as being upon the same "footing. As Lord Sumner, giving the judgment of the "Board in *Ibrahim* v. *The King* (8) remarked (9): 'The "'Board cannot give leave to appeal where the grounds "'suggested could not sustain the appeal itself; and, con-"'versely, it cannot allow an appeal on grounds that would "'not have sufficed for the grant of permission to bring it.' "He added, what is material in the present case: 'Mis-"'direction, as such, even irregularity as such, will not "'suffice. . . . There must be something which, in the "'particular case, deprives the accused of the substance of "'fair trial and the protection of the law, or which, in "'general, tends to divert the due and orderly administration "'of the law into a new course, which may be drawn into an "'evil precedent in future.'"

Their Lordships may be permitted to say that the appellant's case was argued with great force and ability. Nevertheless, they are not persuaded that any ground for interference with the conviction has been established and accordingly they have, as they indicated at the end of the hearing, humbly advised His Majesty that the appeal should be dismissed.

Solicitors: *Darley, Cumberland & Co.; Burchells.*

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(7) [1936] A. C. 445, 475.
(8) [1914] A. C. 599.
(9) Ibid. 615.

SLAZENGERS (AUSTRALIA) PTY. LIMITED Appellant;

AND

IVY PHYLLIS EILEEN BURNETT . . Respondent.

J. C.*
1950
July 10.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Australia (New South Wales)—Workmen's compensation—Workman's coronary occlusion while journeying to work—Not contracted in course of, or contributed to by, employment but due solely to autogenous causes—Whether workman "received injury"—Not entitled to compensation—Appeal to Privy Council—Competency—Workers' Compensation Act, 1926–47, of New South Wales, s. 6, sub-s. 1; s. 7, sub-s. 1 (a) (b); s. 37, sub-s. 4.

A workman, who for some months before his death had been receiving medical treatment for hypertension and myocardial degeneration, suffered a coronary occlusion, from which he died on the same day, while journeying by tram from his place of abode to his place of employment. It was common ground that the hypertension, myocardial degeneration and coronary occlusion were not contracted by him in the course of his employment with the appellant, nor was the employment a contributing factor thereto; neither was an injury which arose out of or in the course of his employment. The coronary occlusion was solely due to autogenous causes and had no causal connexion whatsoever with the journey.

Held, on the above facts, that the deceased workman had not "received injury" within the meaning of s. 7, sub-s. 1 (*b*), of the New South Wales Workers' Compensation Act, 1926–47, which provides, inter alia, that "where a worker has received injury "without his own default or wilful act" on any daily journey between his place of abode and his place of employment, then subject to exceptions (i) and (ii) "the worker (and in the case of the death of the worker, his dependants), shall receive compensation from the employer in accordance with this Act".

It was legitimate to construe s. 7, sub-s. 1 (*b*), as treating any injury received by a workman in the course of a journey of the limited character covered by s. 7, sub-s. 1 (*b*), as if it were an injury received by him in the course of his employment and as giving the same measure of protection if he received the same kind of injury. That was a provision both rational and consistent with the general scheme of the Act, but it involved that after the words "the worker" where they occurred immediately after exception (ii) in s. 7, sub-s. 1 (*b*), some such words as "shall be deemed to have "received such injury in the course of his employment and he" were by implication to be read into the sub-section. The word "injury" in sub-s. 1 (*b*) of s. 7 would thus retain its statutory meaning as defined in s. 6, sub-s. 1 of the Act, but sub-s. 1 (*b*) would afford a valuable measure of relief in cases not covered by s. 7, sub-s. 1 (*a*). If the injury received during the journey were some injury other than a disease it would be an injury received by the worker in the course of his employment and he would be entitled to compensation; if the injury were a disease "received" (a difficult word in that connexion to give effect to) during the journey, and if it were a disease to which the employment, including the journey, was a contributing factor, then equally he would be entitled to compensation.

**Present*: Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid.

Reasoning in *Peart* v. *Hume Steel, Ld.* (1947) 75 C. L. R. 242, displaced.

An appeal lies to His Majesty in Council from a decision of the Supreme Court of New South Wales on a case stated by the Workers' Compensation Commission under the Workers' Compensation Act.

Order of the Supreme Court of New South Wales (1948) 48 N. S. W., St. R. 405, reversed.

APPEAL (No. 1 of 1949) from a judgment and order of the Supreme Court of New South Wales (June 1, 1948) made on a case stated by the Chairman of the Workers' Compensation Commission.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. The respondent was the administratrix of the estate of Minnie Gertrude Milligan who was an applicant for compensation under the Workers' Compensation Act, 1926–47, of New South Wales, in respect of the death on May 29, 1947, of her husband, John Samuel Milligan, a worker employed by the appellants.

The relevant provisions of the Act which must be stated were as follows:—

> "Section 6 (1). In this Act, unless the context or subject-"matter otherwise indicates or requires
>
> . . . . . .
>
> "'Injury' means personal injury arising out of or in "the course of employment and includes a disease which "is contracted by the worker in the course of his employ-"ment whether at or away from his place of employment "and to which the employment was a contributing "factor but does not, save in the case of a worker "employed in or about a mine to which the Coal Mines "Regulation Act, 1912–41, applies, include a disease "caused by silica dust.
>
> "Section 7 (1) (*a*). A worker who has received an injury "whether at or away from his place of employment (and in "the case of the death of the worker, his dependants) shall

"receive compensation from his employer in accordance with "this Act.

"(*b*) Where a worker has received injury without his own "default or wilful act on any of the daily or other periodic "journeys referred to in paragraph (*c*) of this sub-section, "and the injury be not received:—

"(i) during or after any substantial interruption of, "or substantial deviation from, any such journey, made "for a reason unconnected with the worker's employ-"ment, or unconnected with his attendance at the trade, "technical or other school, as the case may be; or

"(ii) during or after any other break in any such "journey, which the Commission, having regard to all "the circumstances, deems not to have been reasonably "incidental to any such journey;

"the worker (and in the case of the death of the worker, his "dependants), shall receive compensation from the employer "in accordance with this Act.

"(*c*) The daily or other periodic journeys referred to in "paragraph (*b*) of this sub-section shall be—

"(i) between the worker's place of abode and place "of employment; and

"(ii) between the worker's place of abode, or place "of employment, and any trade, technical, or other "training school, which he is required by the terms of "his employment, or is expected by his employer, to "attend.

"(*d*) The provisions of paragraphs (*b*) and (*c*) of this sub-"section shall not apply to or in respect of an injury received "after the expiration of six months after the termination of "the war, which commenced on the third day of September, "one thousand nine hundred and thirty-nine.

"(4) Where the injury is a disease which is of such a "nature as to be contracted by a gradual process compensa-"tion shall be payable by the employer in whose employment "the worker is or who last employed the worker.

"(5) For the purposes of sub-section four of this section "and of sections forty-four and fifty-three of this Act the "injury shall be deemed to have happened at the time of the "worker's incapacity."

Certain other provisions (which are referred to in the judgment of the Board) were relevant to a plea to jurisdiction raised by the respondent.

The material facts, on which an award of 800*l*. was made in favour of the applicant, were thus stated by way of summary in a case stated by the Chairman of the Workers' Compensation Commission of New South Wales under s. 37, sub-s. 4, of the Act:

> "(1) The deceased was employed by the appellant "Slazengers (Australia) Pty. Ld. and the respondent Minnie "Gertrude Milligan was totally dependent on the deceased's "earnings at the time of his death.
>
> "(2) On the twenty-ninth day of May One thousand nine "hundred and forty-seven the deceased was journeying by "tram on his daily journey between his place of abode at "23, Townes Gardens, Pagewood, and his place of employment with the appellant at Alexandria when he suffered a "coronary occlusion from which he died at his place of abode "on the same day.
>
> "(3) The physical effort of the deceased arising out of the "journey did not play any part in the happening of the "occlusion.
>
> "(4) For some months prior to his death the deceased had "been receiving medical treatment for hypertension and "myocardial degeneration. It was common ground that the "hypertension, myocardial degeneration and coronary occlusion were not contracted by the deceased in the course of "his employment with the appellant nor was the employment a contributing factor thereto; neither was an injury "which arose out of or in the course of deceased's "employment.
>
> "(5) The coronary occlusion was solely due to autogenous causes and had no causal connexion whatsoever "with the journey."

On those facts the question of law referred at the request of the appellant for the decision of the Supreme Court was as follows:—

> "On the Commission's findings of fact did the Commission err in law in holding that the deceased John Samuel "Milligan 'received injury' within the meaning of s. 7, "sub-s. 1 (*b*), of the Workers' Compensation Act, "1926–47?"

That question was answered by the Supreme Court (Jordan C.J., Davidson and Street JJ.) in the negative. The learned Chief Justice was of the opinion, in which the other members of the court concurred, that the case was completely covered by the reasons given by that court in the earlier case of *Peart* v. *Hume Steel, Ld.* (1), which had been approved by the High Court of Australia on appeal (2).

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(1) (1947) 47 N. S. W., St. R. 384.

(2) (1947) 75 C. L. R. 242.

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Slazengers (Australia) Pty. Ld. v. Ivy Phyllis Eileen Burnett.

1950. June 6, 7. *Sir David Maxwell Fyfe K.C.* and *Gahan* for the respondent. There is a preliminary point as to jurisdiction, which raises three questions: (a) was the Supreme Court's decision to have attached to it the ordinary rights of appeal? (b) did the legislature use language apt to exclude such rights of appeal? and (c) was the prerogative to grant special leave to hear the appeal as of right taken away? So far as the Workers' Compensation Act is concerned, it is submitted that the legislation by itself has not used language apt to exclude rights of appeal to the Supreme Court by way of case stated, but it creates a jurisdiction without the right of appeal to the Board. There is no provision for appeal from the decision of the Supreme Court on a case stated: ss. 36 and 37. It is clear that that court's decision is binding on the Commission, which will then give effect to it. There is a line of authorities which supports the submission that this legislation does not envisage an appeal to the Board. In that case, of course, the prerogative does not come into it—it was never contemplated that it would apply. Here, what the legislature enacted was that the Commission should act in a non-judicial way; that there should be no interference with it by the Judiciary; and that there should be a limited right of getting advice on a point of law by a case stated. It is the decision of the Supreme Court, which must be returned with the case stated, which is binding on the Commission. If the Commission puts that decision of the Supreme Court into effect no-one can interfere. [Reference was made to the following authorities on the question whether the Workers' Compensation Act ever contemplated an appeal to the Privy Council: *Théberge* v. *Laudry* (3); *Cushing* v. *Dupuy* (4); *Moses* v. *Parker, Ex parte Moses* (5); *In re Wi Matua's Will* (6); *Canadian Pacific Railway* v. *Toronto Corporation and Grand Trunk Railway of Canada* (7); *Mohammad Yakub Khan* v. *Reg.* (8); and *De Silva* v. *Attorney-General for Ceylon* (9).] The question here is not whether there are words ousting the jurisdiction, but whether it was ever the intention to create a tribunal with the ordinary incidents of appeal to the Crown. It was never so intended in this case.

G. E. Barwick K.C. and *B. P. MacFarlan* (both of the Australian Bar) for the appellant, were not required to argue on the preliminary point, but reference was made to *Smith* v. *Mann* (10).

The word " injury " in s. 6, sub-s. 1, of the Act—the definition section—includes only such diseases as are contracted in the

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(3) (1876) 2 App. Cas. 102, 108–9.

(4) (1880) 5 App. Cas. 409, 418.

(5) [1896] A. C. 245, 249.

(6) [1908] A. C. 448.

(7) [1911] A. C. 461, 470–2.

(8) (1947) L. R. 74 I. A. 8.

(9) [1949] W. N. 248.

(10) (1932) 47 C. L. R. 426.

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course of the employment and to which the employment contributes. A man who suffered a heart attack, the disease giving rise to it being unconnected with his work, did not receive an injury in the course of his employment and was not entitled to compensation: *Kellaway* v. *Broken Hill South, Ld.* (11); only the result, not the reasoning, of that case is adopted. There is no reason or context which requires the word " injury " to be given any other meaning in s. 7, sub-s. 1 (*b*); that means, amongst other things, that the same word has the same meaning throughout the Act. Whether or not the definition of " injury " in s. 6 is applicable to s. 7, sub-s. 1 (*b*), the word in the latter sub-section on its true construction does not include death by disease not induced, accelerated or contributed to by the journey or the employment. If the definition of injury in s. 6 is wholly inapplicable to the word as found in s. 7, sub-s. 1 (*b*), it should be given in the latter sub-section its natural meaning, which does not include the onset or the development of a disease. Death from autogenous causes is not an injury within the meaning of the subsection. There is no warranty for choosing, as has been done, an artificial meaning for the word, a meaning drawn from the expression " injury by accident " as found in a different statute. The decision in *Peart* v. *Hume Steel, Ld.* (12) is not decisive of the present case, but if, contrary to that submission, it is decisive, it was wrongly decided.

Sir David Maxwell Fyfe K.C. and *Gahan.* The definition of " injury " in s. 6, sub-s. 1, is wholly inapplicable to that word in s. 7, sub-s. 1 (*b*); " injury " in the latter sub-section has a wider meaning than " an injury " in s. 7, sub-s. 1 (*a*), and than the definition in s. 6. The context and subject-matter of sub-cl. (*b*) requires such wider meaning since otherwise the sub-clause would have no possible field of operation. It has in fact been common ground in the argument below in this case and in judicial decision in *Peart's* case (12) that there is a different meaning for " injury " in the two paragraphs of the same sub-section. When there is a meaning of " injury " evolved by judicial interpretation and then there is legislation in the same field, prima facie, unless the contrary can be shown, the word has the meaning given by the judicial interpretation. That argument does not seek to import a judicial interpretation under another judicial system, for the position in Australia was moving on a course parallel to that of this country. Where one can point to the contracting or the accentuation of the disease in point of time that becomes an injury per se on its own strength. The effect of the English decisions on this point by 1940 was in favour of the workman; so long as the disease produced an identifiable physiological change it was enough. It was said in *Kellaway's* case (13) that " all " disease is necessarily injury ". On the point whether the solution of this matter is not to import into the Act a causal relation between the injury and the journey, it is submitted that the judgment of Latham C.J. in *Peart's* case (14) should be accepted as governing the matter when he said that it was not necessary that there should be any causal relation between them. The Commission and the Supreme Court rightly applied s. 7, sub-s. 1 (*b*), to the facts found by the Commission.

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(11) (1944) 44 N. S. W., St. R. 210. (12) (1947) 75 C. L. R. 242.

G. E. Barwick K.C. replied. In the way in which the case has developed there are three propositions; first, that of the appellant, that no disease-injuries are included; the second, for the respondent, that all physiological changes are included; the third, the middle course, that s. 6, sub-s. 1, is to be taken mutatis mutandis with s. 7, sub-s. 1 (*b*).

July 10. The judgment of their Lordships was delivered by LORD SIMONDS. This appeal, which is brought from a judgment and order of the Supreme Court of New South Wales, raises a question of difficulty and importance as to the meaning and effect of certain provisions of the N.S.W. Workers' Compensation Act, 1926–47, which will be called " the Act ". [His Lordship then stated the facts set out above and continued:] The facts in *Peart's* case (15) in most respects bore a remarkable resemblance to those of the case under appeal, the points of difference being, first, that in *Peart's* case (15) the actual cause of the coronary occlusion was detected, namely, the fact that a small piece of the lining of the artery had been loosened and had blocked the artery, and, secondly, that this physiological change had taken place as the result of a physical effort made during the journey, namely, that of pedalling a bicycle uphill. These points of difference, which at least established a causal connexion between the injury and the journey, were regarded as material by some at least of the learned judges of the High Court who took part in the decision of *Peart's* case (16). But it will in any case be necessary to examine the reasoning which led to that decision. Before doing so, their Lordships must once more turn to the Act itself.

The Act, as is commonly conceded, makes a substantial departure from former legislation in this field, and in particular deals not, as had previous Acts, with " injury by accident " but with " injury " simpliciter, a change which made it necessary to define what had previously been undefined. The difficulty of such definition is shown in the several alterations which were made in Amending Acts between 1926 and 1947, and is, perhaps, further illustrated by the fact that in the end the definition still contains the word which is itself to be defined. But this at least is clear, that in the Act the word " injury " (unless the context or subject-matter otherwise indicates or requires) must bear a very artificial meaning in that it is to include a disease which satisfies certain conditions and must, therefore, according to ordinary rules of construction, exclude any other disease. It is not disputed that it is this artificial meaning which the word " injury " bears in s. 7, sub-s. 1 (*a*), of the Act. The question is what it means in the immediately following sub-paragraph, s. 7, sub-s. 1 (*b*). In *Peart's* case the learned Chief Justice (Latham C.J.) thus expresses his view: " This ' definition ' is " inapplicable to s. 7, sub-s. 1 (*b*). If ' injury ' in s. 7, sub-s. 1 " (*b*), were given the meaning which is ascribed to the word in " s. 6, then the periodic journey provisions in s. 7, sub-s. 1 (*b*), " would apply only in cases where there was an injury within the " meaning of s. 6, that is, where the injury arose out of or in " the course of the employment, etc., or was a disease of the kind " mentioned in the definition. If these conditions were satisfied, " then the worker would be entitled to compensation under s. 7, " sub-s. 1 (*a*), of the Act, and it would never be necessary for " any worker to have recourse to s. 7, sub-s. 1 (*b*), which would " have no possible field of operation. Accordingly, the context " and the subject matter of s. 7, sub-s. 1 (*b*), exclude the application of the definition of ' injury ' to the word where it appears " in that section " (17). The definition being thus excluded from s. 7, sub-s. 1 (*b*), the question would follow what the expression " received injury " means in its new context, which may for this purpose be treated as the receipt of injury by a worker on his daily journey between his place of abode and place of employment. The appellant, on the assumption that the statutory definition is excluded, says boldly that all disease falls outside the expression; the respondent, on the other hand, contends that it is apt to cover any physiological change which happens during the journey, adopting the reasoning of the learned Chief Justice in *Peart's* case (18) when he says, " It appears to me to be " difficult to draw any satisfactory distinction between the breaking of a limb and the breaking of an artery or the lining of an " artery. One is as much an injury to the body, that is, something which involves a harmful effect on the body, as the other. " Each is a disturbance of the normal physiological state which " may produce physical incapacity and suffering or death.

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(13) 44 N. S. W., St. R. 210.
(14) 75 C. L. R. 242.
(15) 47 N. S. W., St. R. 384.
(16) 75 C. L. R. 242.

(17) 75 C. L. R. 242, 251.

(18) Ibid. 252–3.

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"Accordingly, in my opinion the detachment of a piece of lining "of the artery in the present case should be held to be an "injury. The death of the worker resulted from that injury." It is to be observed that the learned Chief Justice repudiated the idea that any causal connexion between the injury and the journey was necessary. In his view a temporal relation was sufficient, namely, that the injury happened while the worker was on the journey. It is not clear that all the members of the High Court took the same view on this point.

This decision leads to the remarkable consequences on which the learned Chief Justice himself observes. A worker who, having reached his place of employment, dies of a coronary occlusion, being the result of a disease to which the employment was not a contributing factor, is not entitled to compensation: see *Kellaway* v. *Broken Hill South, Ld.* (19), a case clearly decided correctly, though some of the reasoning may be open to criticism. On the other hand, the same worker, if he dies of the same disease, in the course of his journey to or from his place of employment, is entitled to compensation.

The fact that a particular interpretation of an Act may lead to strange consequences does not make it an impossible interpretation. But it should not be adopted if a more reasonable one can be found. It appears to their Lordships that without doing violence to its language a satisfactory construction of the section may be found. The clue to it, as they think, is to be found in an observation of Dixon J. in *Peart's* case (20). "In a "general way", said that learned judge, "the intention doubt-"less was to extend the course of the employment to the journeys "of the workman between his home and his work. Injury "received in the course of his journey is to stand in the same "position as injury in the course of his employment." It appears to their Lordships that the implication of this intention is irresistible. The improbability of the word "injury" bearing a different meaning in successive paragraphs of the same subsection is so great that any legitimate interpretation which avoids this result would appear preferable. It must be conceded that the opening words of s. 6 admit the possibility of the defined meaning being excluded, but this is a general provision covering all the definitions. As a matter of construction it covers the definition of "injury", but the improbability is great that the draftsman should have left the most important word in the whole Act to the hazard of the statutory definition being excluded and some other meaning or meanings, to which no clue is given, being substituted. Moreover, to accord a different and a higher measure of protection to a worker who receives injury during his

(19) 44 N. S. W., St. R. 210.

(20) 75 C. L. R. 257.

journey from that accorded to one who receives it in his place of employment is clearly illogical and out of harmony with the whole scheme of workmen's compensation as developed in the relevant legislation. On the other hand, to treat an injury received by a workman in the course of a journey of the limited character covered by s. 7, sub-s. 1 (*b*), as if it were an injury received by him in the course of his employment, or (to put it somewhat differently) to treat the worker as being in the course of his employment while he is in the course of certain journeys, and to give the same measure of protection if he receives the same kind of injury, is a provision both rational and consistent with the general scheme of the Act. It is, in their Lordships' opinion, legitimate so to construe the sub-section. This involves, no doubt, that after the words "the worker" where they occur immediately after exception (ii), some such words as "shall be "deemed to have received such injury in the course of his employ-"ment and he" are by implication to be read into the sub-section. The result of this construction is to displace the reasoning on which the decision in *Peart's* case (21) was largely founded. The word "injury" will retain its statutory meaning but sub-s. 1 (*b*) of s. 7 will afford a valuable measure of relief in cases not covered by sub-s. 1 (*a*). If the injury received by the worker during his journey is some injury other than a disease, e.g., a broken limb resulting from a collision, it will be an injury received in the course of his employment and he will be entitled to compensation: if the injury is a disease "received" (a difficult word in this connexion to give effect to) during the journey, and if it is a disease to which the employment, including the journey, was a contributing factor, then equally he will be entitled to compensation. Their Lordships are conscious that in thus interpreting the relevant sub-section they do not fully adopt the arguments of either the appellant or the respondent, but it appears to them that thus alone can a reasonable and consistent meaning be given to it in its context.

As has already been mentioned, the respondent took a preliminary objection to jurisdiction, submitting that in ss. 36 and 37 of the Act the legislature was clearly providing that the Commission established under the Act should not be subject to control by way of appeal or otherwise by any court or by His Majesty in Council save only for the control exercised by way of case stated, and that on case stated the decision of the Supreme Court was final and conclusive and was not subject to review by His Majesty in Council. This objection was not taken when application was made to the Supreme Court for leave to appeal to His Majesty in Council, nor, so far as can be ascertained, was it

(21) 75 C. L. R. 242.

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taken on the appeal in *Peart's* case (21) from the Supreme Court of New South Wales to the High Court of Australia. The plea is, in their Lordships' opinion, without validity. It is true that it is provided by s. 36 that the Commission shall have exclusive jurisdiction and that its action or decision shall be final, and further, that its decision shall be on the real merits and justice of the case and that it shall not be bound to follow strict legal precedent. But, whatever might ensue from these provisions and from those of the first three sub-sections of s. 37, the fourth sub-section of that section provides that, when any question of law arises in any proceeding before the Commission, not only may the Commission of its own motion, but it must, if any party as therein prescribed requests, state a case for the decision of the Supreme Court thereon. This procedure is commonly and properly described as an appeal by way of case stated and is in all respects, formal and substantial, an appeal in a legal proceeding to an appellate court of law. It is further provided by sub-s. 7 of s. 37 that the decision of the Supreme Court shall be binding on the Commission and on all the parties to the proceedings. The circumstances in which the decisions of courts of law in His Majesty's Dominions and Colonies are not subject to review by His Majesty in Council have recently been again considered in *De Silva* v. *Attorney-General for Ceylon* (22). Their Lordships think it unnecessary to say more than that in the present case no plausible argument was advanced in favour of the view that under the Workers' Compensation Act the Supreme Court is established as a tribunal from whose decisions on a case stated by the Commission no appeal lies to His Majesty in Council.

In the result, their Lordships will humbly advise His Majesty that this appeal should be allowed and the question stated for the decision of the Supreme Court should be answered in the affirmative. The respondent must pay the costs of the appellant in the Supreme Court and of this appeal.

Solicitors: *Nicholas Williams & Co.; Kingsford, Dorman & Co.*

(22) [1949] W. N. 248.

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July 10.

PAROCHIAL CHURCH COUNCIL OF BRADESTON . . . . PETITIONERS;

AND

CHURCH COMMISSIONERS FOR ENGLAND RESPONDENTS.

SPECIAL REFERENCE IN THE MATTER OF THE UNION OF THE BENEFICES OF WITTON WITH BRUNDALL AND BRADESTON.

Ecclesiastical law—Union of benefices—Commission of inquiry— Constitution—Irregular appointment of commissioner—Effect—Scheme returned for reconsideration—Amended scheme unaffected by previous irregularity—Costs—Union of Benefices Measure, 1923 (14 *&* 15 *Geo.* 5, *No.* 2), *s.* 3, *sub-s.* 1 (*b*) ; *s.* 11, *sub-s.* 3.

Section 3 of the Union of Benefices Measure, 1923, which deals with the constitution of the commission which is to hold a public inquiry in connexion with a proposed union of benefices, provides in sub-s. 1 (*b*) that " one commissioner shall be nominated jointly by " the patron and the Parochial Church Council of each benefice " affected, or, if in any benefice there are two or more separate " Parochial Church Councils, then jointly by the patron and both " or all of the Parochial Church Councils ".

Where there had been a failure to comply with the provisions of sub-s. 1 (*b*) of s. 3 of the Measure, in that a commissioner was nominated by only one of two separate Parochial Church Councils in a benefice which it was proposed to unite with another benefice, and not jointly by both Parochial Church Councils, that commissioner was not duly elected and his participation in the proceedings at the inquiry was an irregularity which, unless cured, would be a bar to the recognition of the result of the commissioners' deliberation.

If, however, the Judicial Committee returns to the Church Commissioners for reconsideration the scheme which the latter have framed, and a scheme acceptable to both parties—the opposing petitioners and the Church Commissioners—is thereafter framed by the latter and affirmed by Order in Council duly gazetted, that scheme, under s. 11, sub-s. 3, of the Measure of 1923, will be valid and of full force and effect notwithstanding any previous non-compliance with any of the requirements of the Measure. Accordingly, the irregularity of the inclusion of the commissioner not duly elected amongst the members of the commission would not affect the validity of the amended scheme.

This was a petition by the Parochial Church Council of Bradeston against a scheme prepared by the respondents, the Church

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* *Present*: LORD PORTER, LORD OAKSEY, LORD RADCLIFFE, SIR JOHN BEAUMONT and SIR LIONEL LEACH.

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v.
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Commissioners for England, for effecting (inter alia) the union of the benefices of Witton with Brundall and Bradeston (which last was part of the benefice of Strumpshaw with Bradeston) all in the County of Norfolk and Diocese of Norwich.

The petitioners took no exception to the scheme except in so far as it provided that the parish of Brundall and the parish of Bradeston should be united into one parish for ecclesiastical purposes under the style of the United Parish of Brundall with Bradeston, and that the parish church of Brundall should be the parish church of the united parish of Brundall with Bradeston. They desired that the scheme should be amended so as to ensure the continued existence of the parish of Bradeston as an ecclesiastical parish in its own right.

The facts appear from the judgment of the Judicial Committee.

1950. May 15, 16. *Quintin Hogg* for the petitioners. All that the petitioners complain of is the provision in the scheme whereby for ecclesiastical purposes Bradeston will cease to be a separate parish. They wish to retain the parish church of St. Michael as a parish church and to remain a separate entity as a parish. There is first a point of law as to the constitution of the commission constituted under s. 3, sub-s. 1 (*b*), of the Union of Benefices Measure, 1923, which provides that "if in any "benefice there are two or more separate Parochial Church Coun- "cils, then" one commissioner shall be nominated "jointly by "the patron and both or all of the Parochial Church Councils". As there were in fact in the united benefice of Strumpshaw with Bradeston two Parochial Church Councils the commissioner who was appointed under s. 3, sub-s. 1 (*b*), a Mr. Ward, should have been jointly nominated by both the Church Councils involved, but in fact the commissioner who was appointed was never nominated by Bradeston. The effect was that the commission was coram non judice, and the scheme is bad in law and void in toto because of that failure to comply with the requirements of the Measure. The procedure adopted was quite irregular, and cannot be treated as a technicality or waived. Bradeston was completely unrepresented by any commissioner on the inquiry. Secondly, to achieve all the practical advantages provided for by the scheme it is sufficient from every reasonable point of view to unite the benefices and unnecessary to unite the parishes.

Wigglesworth for the Church Commissioners for England. This petition, which is directed to the sole point whether there should be one or two parishes, should not succeed. [Reference was made to *Rugg* v. *Bishop of Winchester* (1) and *Rector and*

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(1) (1868) L. R. 2 P. C. 223.

Churchwardens of Capel St. Mary, Suffolk v. *Frank Victor Packard* (2).] If the parishes are united the position of Bradeston would be improved. It is a businesslike arrangement, and would solve the difficulties caused by the geographical peculiarities of the area. The parish church of Brundall, and not that of Bradeston, is the right and more convenient church to be the parish church of the united benefice.

With regard to the contention that the whole inquiry was invalid, admittedly there ought to have been a joint nomination by the two Parochial Church Councils. There was no joint nomination within the time allowed—thirty days. It is then for the Bishop to decide whether the gap shall be filled. In this case by June 22, 1948, it was too late for the joint nomination to be made, and when the Bishop issued the commission as he did, on July 10, he issued a commission which was perfect in every way save that Mr. Ward, who was imperfectly nominated, or not nominated at all, was included in the commission. The commission issued to six persons, of whom five had been nominated. All six were present at the inquiry and all six signed the document. The quorum for a commission of six would be two—that is provided by the Union of Benefices Rules, 1926. The first point about the presence of Mr. Ward is that it is too late to take the objection now. It should have been taken at the public inquiry in August, 1948, of which due notice was given in the Press, or certainly when the scheme was published in April, 1949, and the petitioners' proper remedy would have been by injunction to restrain the Church Commissioners from proceeding further. In any case, none of the commissioners was acting in the capacity of a judge—it is not a court or tribunal in a position to administer the oath; it is really an informal inquiry. Even if the Board are against the respondents on all points, it is still submitted that if there had been five instead of six members of the commission there would have been the same unanimous decision to unite the benefices as provided in the scheme. The presence of Mr. Ward cannot, in any event have affected the result of the commission on that point.

It would be most unfortunate if this case had to start again. There has been no objection to any part of the scheme other than to the union of these two parishes, and if the Board are against the respondents they ask for the return of the scheme so that that matter can be adjusted by the provision for the union of the two parishes being omitted.

Quintin Hogg replied. If the Board are in favour of the petitioners on the point of law, they would be quite content for the Board to return the scheme for amendment. It is not conceded that the right of nomination under s. 3 of the Measure of

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(2) [1927] P. 289, 299–300.

1923 ever lapsed as was suggested for the respondents. If that be right, it puts an end to any further argument on the point of law. It is the presence among the commission of a person not duly nominated which vitiates this inquiry. As to the point not having been taken before, I did not know about it; it is one which goes to jurisdiction and as such cannot be waived by acquiescence, and is always open to be raised on appeal. This petition should succeed and the matter be remitted. If it is the practice to grant costs, the petitioners should have them.

Wigglesworth. The only case in which costs appear to have been given is referred to in a practice note in the Weekly Notes (3). That was a very exceptional case.

July 10. The judgment of their Lordships was delivered by LORD PORTER. The question submitted for the consideration of their Lordships of the Privy Council is raised in a petition of the Parochial Church Council of Bradeston, a parish in the County and Diocese of Norwich, who are appealing against a scheme for the union of that parish with the neighbouring parish of Brundall, which lies generally to the west of Bradeston and is situated in the same County and Diocese. This scheme was certified by the Church Commissioners and notice thereof was given and duly submitted to the petitioners on April 1, 1949.

The parish of Bradeston (or Braydeston) lies some six or seven miles east from Norwich in the Rural Deanery of Blofield and the Archdeaconry of Norwich. The church of St. Michael consists of a chancel, nave, north porch and a western tower containing one bell, and includes several features of architectural, historical and local interest. For civil purposes Bradeston has for over 65 years been united with Brundall, and for ecclesiastical purposes the benefice of Bradeston has for many years been united with that of Strumpshaw, a parish lying to the east, but has never previously been associated with Brundall for ecclesiastical purposes. The living of Bradeston is a rectory in the gift of the Bishop of Norwich. The living of Brundall is a rectory in the gift of the Reverend Charles Martin Chamberlin, M.A.

On July 10, 1948, the Bishop of Norwich issued a commission to six persons in purported compliance with the provisions of s. 3 of the Union of Benefices Measure, 1923, as amended by s. 1 of the Union of Benefices (Amendment) Measure, 1936, to inquire into all the facts and circumstances of the benefices of Strumpshaw, Bradeston, Buckenham, Hassingham, Witton and Brundall relevant to the question of their union or other rearrangement, and, after considering the matters under inquiry in their relation to the interests of religion generally and to the circumstances and claims of the said benefices, to report to him whether such union should be made and to make recommendations as to the terms on which any union or other proposal in favour of which they reported should be carried into effect. It is admitted that five of these six persons were regularly and properly appointed, but it was contended that the sixth, namely, W. Ward of Strumpshaw, had not been duly elected to be a member of the commission and that accordingly the commission's report and the subsequent scheme were invalid. It will be necessary for their Lordships to consider this contention at a later stage.

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(3) [1941] W. N. 107.

The six commissioners held the requisite public inquiry at Brundall on August 20, 1948, and made a report to the Bishop of Norwich, after which the scheme, now the subject of objection, was prepared. Out of the six parishes concerned no question is raised as to Buckenham or Hassingham, and the recommendations in the scheme as regards Strumpshaw are only material as leading to its disunion from Bradeston for ecclesiastical purposes. To this suggestion no opposition is offered. The scheme, however, goes on to provide for the union of the parishes of Witton, Brundall and Bradeston.

The terms on which a union can be recommended are to be found in s. 6, sub-s. 1, of the Union of Benefices Measure, 1923, and may take one of two alternative forms:—

> "Every Scheme for an union of benefices shall recommend that the benefices proposed to be united shall become permanently united together and form one benefice with cure of souls, and either—
>
> "(*a*) that the parishes or places forming or comprised in the benefices proposed to be united or any two or more of them shall be united into one parish for ecclesiastical purposes, or
>
> "(*b*) that such parishes or places shall continue in all respects distinct subject to the express provisions of the Scheme."

In the present instance the recommendation, so far as is material to this appeal, was in the following terms:—

> "*Witton and Brundall with Bradeston.*
>
> "(1.) *Union of Benefices and Parishes.* Upon the day when any Order of Your Majesty in Council ratifying this Scheme is published in the London Gazette (*a*) the benefices of Witton and Brundall and Bradeston shall be permanently united together and form one benefice with cure of souls under the style of 'The United Benefice of Witton and Brundall with Bradeston' and (*b*) the Parish of Brundall and the Parish of Bradeston shall be united into

"one parish for ecclesiastical purposes under the style of 'The "'United Parish of Brundall with Bradeston' but the parish "of Witton shall continue in all respects a separate parish "for ecclesiastical purposes.

"(2.) *Parish Church.* The parish church of the parish of "Brundall shall be the parish church of the united parish of "Brundall with Bradeston."

It is apparent, therefore, that in the case of the parishes of Brundall and Bradeston the first alternative was chosen and in the case of Witton the second. The petitioners are not directly concerned with the position of Witton, but are strongly opposed to the union of Bradeston and Brundall into one parish for ecclesiastical purposes. They would be content that all three parishes should be permanently united into one benefice for ecclesiastical purposes, provided that Bradeston should continue in all respects distinct, subject to the other express provisions of the scheme.

In order that their Lordships might be fully informed of the relative positions of the three parishes and the location of their churches a map of the district has been provided. In addition, particulars were given of the size and population of the three parishes, of the church services now held and of the respective distances of one village from the others. From these particulars it appears that Witton and Brundall are rather larger in acreage than Bradeston, but Bradeston has the largest population, containing about 600 souls as opposed to about 500 in Brundall and 139 in Witton. Of the three churches, Brundall is undoubtedly the most central. Bradeston is apparently not so easy of approach, but it is distant only about five-eighths of a mile from its village. The number of sittings in each of these parishes is: Witton 80; Brundall 100; and Bradeston estimated on the part of the Ecclesiastical Commissioners at 80, but of the petitioners at 120. Brundall alone of the three parish churches concerned now holds the statutory services of Matins and Evensong. In the case of Witton there is Evensong only, and in Bradeston Matins alternating with Holy Communion, but no evening service. It is difficult to see how, without an increase in the number of clergy, this result could be avoided. Attendance at Brundall is about double that at Bradeston. Witton has a very small attendance indeed, but it is an isolated village with its population grouped round the church and is said to have an active church life. In any case, no objection is made to the recommendation in the scheme that it should continue to remain distinct subject to the provisions of the scheme.

As their Lordships have indicated, objection has been taken to the constitution of the body of commissioners on the ground that Mr. W. Ward was not validly appointed. The constitution of the commissioners is dealt with in s. 3 of the Measure of 1923, and the particular portion with which their Lordships are concerned is to be found in sub-s. 1 (*b*), which provides that:

> "The commission shall be constituted and the commissioners shall be nominated as follows, namely:—
>
> "One commissioner shall be nominated jointly by the patron and the Parochial Church Council of each benefice affected, or, if in any benefice there are two or more separate Parochial Church Councils, then jointly by the patron and both or all of the Parochial Church Councils."

The commissioner representing the combined benefices of Strumpshaw and Bradeston should therefore (subject to one modification) have been chosen jointly by the patrons of these two livings and the Parochial Church Councils of each. The modification referred to is to be found in sub-s. 2 of s. 3, by the terms of which the Bishop, as patron of Bradeston, could take no part in the nomination of the commissioner. By what method any two parishes and their patrons or patron are to arrive at their joint choice is not very clear, but in any case a separate choice of two persons, one by each parish, is not warranted. What actually occurred is set out in para. 4 of the Answer of the Church Commissioners to the Petition in the following words:—

> "In the first instance the said W. Ward was nominated as a Commissioner by the Parochial Church Council of Strumpshaw and Mr. W. J. Spooner of Broadlands, Brundall, was nominated as a Commissioner by the Parochial Church Council of Bradeston, but by virtue of s. 3, sub-s. 1 (*b*), of the Union of Benefices Measure, 1923, the two said Parochial Church Councils being in a single benefice were entitled to nominate jointly one Commissioner only. Mr. C. B. Bolingbroke, Legal Secretary to the Bishop of Norwich, who made the preliminary local arrangements for the Commission, informed the Reverend William Reginald Devenish, then incumbent of the benefice of Strumpshaw with Bradeston and as such the Chairman of the said two Councils, that the said two Councils were only entitled to nominate one Commissioner. According to the recollection of the said C. B. Bolingbroke, the Reverend William Reginald Devenish replied that the said W. Ward should be the Commissioner."

At the prescribed inquiry Mr. Ward, in accordance with Mr. Devenish's suggestion, acted as one of the commissioners. Mr. Spooner, on the other hand, attended merely as a parishioner and made a statement. Some conflict of evidence as to what Mr. Spooner said on this occasion is to be found in the evidence contained in various affidavits which have been exhibited in the course of the proceedings. He was understood by the commissioners themselves and those supporting the scheme to say that his

Parochial Church Council had no objection to the union of the parishes or to Brundall church being the parish church of the united parish. Mr. Spooner is himself of opinion that he was only asked about a union of the two benefices, a union to which he and those whom he represented had no objection. That his intention was to go no further derives some support from his words as recorded in the commission's report of the inquiry in which he is said to have stated that there appeared to be no objection to the proposed union " provided there was co-operation with, and not " absorption by, Witton and Brundall ".

Clearly the commissioners thought him to have gone further, but their Lordships do not think that a layman would necessarily appreciate the exact implication of the expressions used. Even, however, if he had supported the scheme, and their Lordships are by no means persuaded that he intended to do so, his Parochial Church Council, so far from taking a favourable view, sent, a few days later after a meeting of the Council, a notice of protest apparently drafted by Mr. Spooner as secretary. This protest was followed a month later by a strongly-worded letter of objection. In spite of this opposition the Church Commissioners were of opinion that sufficient cause had not been shown for modifying the proposals and so informed the objectors by letter of June 20, 1949.

The petitioners then obtained the signatures of some 200 parishioners of Bradeston over 16 years of age, in opposition to the proposed scheme, and these signatures and the fact that they were freely obtained has since been verified by affidavit. They also obtained support from resolutions of objection by the Brundall Parish Council and the Brundall Parochial Church Council and from an affidavit of the Reverend William Reginald Devenish, until lately incumbent of the united benefices of Strumpshaw with Bradeston. It is true that the original objection put forward by the petitioners on April 11, 1949, rested on the contention that baptisms, burials and weddings should continue to take place as theretofore in Bradeston church and that, as the Church Commissioners answer, the fact that Bradeston church had become a chapel of ease would not prevent baptisms being held there, that the right of interment was preserved so long as the churchyard remains open for burial by s. 11 of the Union of Benefices (Amendment) Measure, 1936, and that under s. 20 of the Marriage Act, 1949, the Bishop of Norwich could authorize the publication of banns and the solemnization of marriage in the church. No doubt in practice this would generally be a solution of the difficulties, but it has to be remembered that the right to demand baptisms would be gone, the right of marriage could on proper notice be withdrawn, or not renewed, and there might be more difficulty in enlarging the churchyard of a chapel of ease, if enlargement was required, than of a parish church. Moreover, the petitioners were desirous of retaining their own churchwardens and Parochial Church Council. It is true that the annual parochial church meeting could, if this scheme were approved, under r. 13, sub-r. 4, of the Rules for the Representation of the Laity frame a scheme for securing due representation of the congregation of Bradeston in the Parochial Church Council of the united parishes and the duties performable by churchwardens at Bradeston church could be suitably provided for, but all this is problematical and leaves the parishioners of Bradeston under the control of the united parish instead of their own.

Ultimately the only matter in issue between the Church Commissioners and the petitioners is whether the union of benefices should be effected under s. 6, sub-s. 1 (*a*), of the Union of Benefices Measure, 1923, thereby creating one parish and depriving Bradeston church of its position as a parish church, or under s. 6, sub-s. 1 (*b*), leaving Bradeston a distinct parish.

The main advantage of the former course would, as their Lordships think, be to leave the determination of the number of services to be conducted at Bradeston to the discretion of the Bishop of Norwich and to dispense with the statutory duty of conducting Matins and Evensong. In their Lordships' view the achievement of this result is not a sufficient reason for the suggested change in the face of the opposition offered not only by the Parochial Church Council of Bradeston but also by that of Brundall as well as of the Brundall Parish Council. They therefore consider that the true solution is to unite Bradeston like Witton with Brundall under s. 6, sub-s. 1 (*b*), and to leave it distinct, subject to the other provisions of the scheme.

The only further matter which their Lordships need mention is the validity or invalidity of the constitution of the Commission of Inquiry consequent on the appointment and presence of Mr. Ward. Plainly Mr. Ward was not duly elected; he was chosen by the Parochial Church Council of Strumpshaw and its patron and not jointly by the patron of Strumpshaw and the two councils of Strumpshaw and Bradeston. This irregularity in their Lordships' opinion was not cured by the intervention of the Reverend William Reginald Devenish, nor by the fact that the commission had the requisite quorum of members without him. He sat, voted and had a say in the proceedings. It would not be right to speculate what effect his presence had on the result. It was sought, however, to establish on behalf of the respondents that the petitioners' right of objection had come to an end. It must be inferred, they said, that the Bishop had requested the petitioners in writing to nominate a commissioner more than thirty days before their objection was made; that they had failed to agree as to the person to be nominated; and that under s. 3, sub-s. 5, of the Measure of

1923 their right to nominate had accordingly lapsed. No request in writing was proved, and their Lordships do not feel themselves justified in drawing any such inference, but in any case, as they have said, in their view Mr. Ward's participation in the proceeding is an irregularity which, unless cured, would be a bar to the recognition of the result of the commissioners' deliberation. Nevertheless, the duty of their Lordships under s. 12, sub-s. 5, of the Measure of 1923, as amended by s. 6, sub-s. 1, of the Measure of 1936, is to make a report to His Majesty in Council, and one of the proposals which they may make is to return the scheme for reconsideration to the Church Commissioners who, by ss. 1 and 2 of the Church Commissioners Measure, 1947, have been substituted as the authority concerned in the place of the Ecclesiastical Commissioners, who were formerly the appropriate body. They would point out that if, after reconsideration by the Church Commissioners, the scheme is ultimately affirmed by an Order in Council duly gazetted, such scheme under s. 11, sub-s. 3, of the Measure of 1923 is valid and of full force and effect notwithstanding any previous non-compliance with any of the requirements of the Measure or any omissions in regard thereto, and notwithstanding any variations between such scheme and the proposals on which the same was based. Their Lordships understand that the scheme with the variation proposed by them would satisfy the wishes of both the petitioners and the Church Commissioners and would be preferred to its rejection.

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If, then, a scheme acceptable to both parties was framed by the Church Commissioners and thereafter affirmed by an Order in Council duly gazetted, the irregularity of the inclusion of Mr. Ward amongst the members of the commission would not affect the validity of the amended scheme.

Their Lordships, therefore, in making their report to His Majesty in Council, humbly suggest that the scheme certified by the Church Commissioners be returned to them for reconsideration in the light of their proposals. Each party should bear his own costs of the proceedings.

Solicitors: *Daynes, Keefe & Co., Norwich; Milles, Day & Co.*

Followed. GRACE BROS. PTY. *v.* COMMONWEALTH OF AUSTRALIA [1951] A. C. 53

J. C.*

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July 27.

NELUNGALOO PTY. LIMITED . . . APPELLANT;

AND

COMMONWEALTH OF AUSTRALIA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Appeal to Privy Council—Jurisdiction—National Security (Wheat Acquisition) Regulations, 1939, *reg.* 19—*Constitutional validity—Inter se question—No certificate of High Court—Appeal incompetent—Commonwealth of Australia Constitution,* 1900 (63 & 64 *Vict., c.* 12), *s.* 51 (xxxi); *s.* 74.

By s. 74 of the Commonwealth of Australia Constitution: "No "appeal shall be permitted to the Queen in Council from a decision "of the High Court upon any question, howsoever arising, as to the "limits inter se of the constitutional powers of the Commonwealth "and those of any State or States . . . unless the High Court shall "certify that the question is one which ought to be determined by "Her Majesty in Council. . . ."

The appellant company, which had delivered its 1945–46 wheat crop to the Australian Wheat Board and had received sums as advances towards its claim to compensation "in accordance with the "National Security (Wheat Acquisition) Regulations, 1939", made under the National Security Act, 1939, claimed, inter alia, a declaration that reg. 19 of the regulations was invalid, and sought compensation based on the value of the wheat to the appellant at the date of acquisition. Regulation 19 provided, inter alia, that "the basis of the compensation to be recommended by the Board "shall be the rate or rates per bushel arrived at by reference to the "surplus proceeds from the disposal of wheat", subject to certain specified deductions. The appellant contended that reg. 19 did not provide just terms because, inter alia, the Wheat Board was not bound to obtain the best possible price for the wheat handled by it, and alleged that the regulation was invalid as being ultra vires placitum xxxi of s. 51 of the Commonwealth Constitution, which provided that the Parliament of the Commonwealth should have power "to make laws for the peace, order and good government of the "Commonwealth with respect to the acquisition of property on just "terms from any State or person for any purpose in respect of "which the Parliament has power to make laws".

Held, that the attack on the validity of reg. 19 on the ground that it did not provide just terms within the meaning of s. 51, placitum xxxi, raised an inter se question, and that, the appellant not having obtained a certificate of the High Court as required by s. 74

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* *Present*: LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD REID.

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of the Constitution, the Board had no jurisdiction to entertain the appeal.

Placitum xxxi "creates . . . a power to acquire on just terms "and not otherwise. . . . The exercise of the power is conditional on "the observance of the constitutional limitation. . . . The question "whether the constitutional limitation of the Commonwealth power "had been exceeded raises the question how far the constitutional "power of the Commonwealth reaches into the State and how far, "if at all, the States' power has been affected by the Commonwealth "power. Each of these questions requires the Court to determine, "on a construction of the Constitution, the limitations of the powers "of the Commonwealth and of the States inter se."

The Board were not disposed to allow exceptions to the broad construction which they had adopted—that an appeal involving the determination of any inter se question is excluded from their jurisdiction in the absence of a certificate from the High Court. An appellant may accept the determination of the High Court on an inter se question and present a petition for special leave to appeal on other questions only, but if he insists in his appeal on raising an inter se question, whether as part of his main ground of appeal or as part of an alternative ground of appeal, he must obtain a certificate from the High Court under s. 74. It would be a misconception of the decision in *Commonwealth of Australia* v. *Bank of New South Wales* [1950] A. C. 235 to suppose that the Board, if the necessity for determining the inter se questions had appeared not at the outset, but only after they had decided other antecedent questions adversely to the appellants, would have gone on to determine the inter se questions which were then seen to be necessary for the decision of the appeal.

Jones v. *Commonwealth Court of Conciliation and Arbitration* [1917] A. C. 528 referred to.

APPEAL (No. 7 of 1950), by special leave, from an order of the High Court of Australia (May 31, 1948) dismissing on an even division of opinion an appeal from an order of Williams J. (July 2, 1947) who had dismissed an action in which the appellant claimed against the respondents compensation for its wheat acquired by the Commonwealth and, inter alia, a declaration that reg. 19 of the National Security (Wheat Acquisition) Regulations, 1939, was invalid.

One of the contentions of the appellant was that compensation should not be assessed under reg. 19 of the regulations by reason of the fact that it was invalid as not providing for just terms under s. 51, placitum xxxi, of the Commonwealth Constitution. The respondents thereupon contended that any question on the validity of any provision under s. 51, placitum xxxi, was an inter se question, and they raised a preliminary objection that, in the absence of a certificate of the High Court under s. 74 of the Constitution, the appeal to the Board was not competent.

The material facts, and the relevant terms of the Australian Constitution and of the Wheat Acquisition Regulations appear from the judgment of the Judicial Committee. The report of the argument is confined to the preliminary objection.

1950. June 8, 12, 13, 14, 15, 19, 20, 21. *Pritt K.C.*, *A. R. Taylor K.C.* (Australian Bar), *Gahan*, and *R. Else-Mitchell* (Australian Bar) for the respondents. The appeal is barred by s. 74 of the Constitution as involving an inter se point. Any question on the validity of any provision under s. 51 (xxxi) of the Constitution is an inter se question, and for this reason, if particular Commonwealth legislation providing for the acquisition of certain property is held to be valid, it enables the Commonwealth to take the property from an individual or a State, and the power of the State is then pro tanto cut down. Assuming, first, that the question of the validity of reg. 19 is an inter se question, the first submission is that that question comes up imperatively in this appeal, and that the Board should renounce jurisdiction. Secondly, even if that question does not come up inevitably, it is almost bound to come up and the Board will have to decide it if the appeal proceeds. Whether reg. 19 is valid or invalid is an inter se question. The respondents assert that it is valid, and that they can acquire wheat validly by means of a pool. If it be right that the Commonwealth can do that, then the States cannot; and if the Commonwealth cannot, then the States can; there is no question of overlapping the boundary between State and Commonwealth power. The question of the validity of reg. 19 is a typical inter se point, and it is very real, not academic. It gives a power to acquire on just terms only. This Board has no jurisdiction, without a certificate of the High Court, to construe the Constitution so as to lay down a rule delimiting the legislation of the Commonwealth and the States. There are a number of authorities to show that this sort of point is an inter se one: *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1).

A. R. Taylor K.C., following. Section 74 of the Constitution refers to the question of the limits inter se of the constitutional powers of the Commonwealth and those of any State or States; if the Board decides that reg. 19 is or is not valid it is deciding a question as to the limits of the constitutional powers, because if it is said that the Commonwealth can do this, it is being enabled to do something which the States could have done without any interference if the State had passed any such law. A decision that reg. 19 is good or bad must operate inevitably either to restrict or to expand the boundaries of the concurrent field in

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(1) [1917] A. C. 528.

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which State and Federal Parliaments both may legislate. The latest decision on what is an inter se question is contained in the judgment of Dixon J. in *Australian National Airways Pty. Ld.* v. *The Commonwealth* (2), when an application was made for a certificate; it was there said that " the settled interpretation of " the crucial words of s. 74 . . . is that they cover any decision " upon the extent of a paramount power of the Commonwealth, " paramount over the concurrent powers of the States ".

G. E. Barwick K.C. and *B. P. MacFarlan* (both of the Australian Bar) for the appellant. A decision that an Act is not valid so far as s. 51 (xxxi) is concerned is not an inter se point; to decide the validity or invalidity of a Commonwealth Act so far as s. 51 (xxxi) is concerned does not touch the legislative power of the State to acquire property. The submission for the respondents begins and to some extent ends on this point with the contention that every decision as to the validity of a Commonwealth Act under s. 51 is necessarily a decision inter se. It has never been so decided. The decision in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (3), and one or two passages in the reports of High Court decisions, all proceed on this notion, that there are two areas of legislative power, and as one is extended by decision the other is reduced. If it is decided that the invasion of the Commonwealth into and to the exclusion of the State is warranted, then there is an inter se question, but until there is that invasion and the moving of the boundary there is nothing inter se. A decision whether a Commonwealth Act is or is not valid in a field in which the State has still got concurrent legislative power is not an inter se question. A decision as to the validity or invalidity of reg. 19 is merely a decision whether a particular Act of the Commonwealth within the concurrent legislative field is valid, and that is not an inter se point. There is no inconsistency, no limitation, in any legislative sense as to the legislative power on what the State can do; they lie side by side. The question which the Board have to decide here is one of construction, and if it is decided that reg. 19 could not be valid, the Board's reasons for arriving at that conclusion are not in themselves a decision inter se or involving a decision inter se.

Even if the decision of whether the law authorizing acquisition raised an inter se question in other cases, which is not conceded, in the present case it cannot, because the only area of dispute or debate in the only matter to be decided is whether the particular terms proffered satisfy this limitation of " just terms ". The terms do not invade State power; whether the Commonwealth's terms are right or wrong makes no difference to the State power,

(2) (1946) 71 C. L. R. 115, 122.

(3) [1917] A. C. 528.

if it is conceded that the acquisition is good. It is not correct to say that every decision as to the validity of a Commonwealth law in relation to s. 51 necessarily involves a question inter se. Each case must be separately examined, regard being had to the particular subject-matter. The question in each case is whether the existence of the impugned law enlarges or diminishes the area of the State's legislative power. In the case of s. 51 (xxxi), by reason of the nature of the subject-matter, a decision as to the validity of a Commonwealth Act authorizing acquisition does not involve a decision inter se, and in particular, if the decision is only as to the constitutional sufficiency of the terms of acquisition, the decision does not involve a matter inter se. [Reference was made to the dictum of Dixon J. in the *Australian National Airways* case (4).] There is a decision in the State Court of New South Wales to the effect that a decision as to the validity of a regulation made under the National Security Act is an inter se point: *Ex parte King; Re the University of Sydney* (5): it is submitted that that majority decision was wrong. The question whether a regulation made under the National Security Act is valid does not raise any inter se point. [Reference was also made to *Commonwealth of Australia* v. *Bank of New South Wales* (6).]

Pritt K.C. in reply. There is a very clear inter se question and a limitation on the power of the State if it is shown that a State's power is only concurrent and not exclusive, and, of course, vice versa: Sawer's Australian Constitutional Cases, p. 463; *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (7); the *Australian National Airways* case (4); *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (8). It is a wholly false conception that the Commonwealth can extend into a field where the States have some power, and yet not impinge on the power of the States. The challenge to the regulations might have been made before any order was made, and then, it is submitted, it would be plain that there would be an inter se question, because the Commonwealth would be saying that the regulations were valid, and that they could take the wheat under reg. 19 terms, and would be saying, therefore, that the States, while they may have concurrent power, certainly have not got an exclusive power to do that. The mere fact that the particular order that was made took all the wheat from the moment of its harvesting, and took it not for one season but indefinitely, cannot mean that the question becomes a merely academic one.

July 27. The judgment of their Lordships was delivered by LORD NORMAND. This is an appeal, by special leave, from an order of the High Court of Australia dismissing an appeal by the appellant company in an action brought by it against the respondents to recover certain moneys as compensation or, alternatively, as damages for the expropriation of wheat by the Commonwealth by virtue of the National Security (Wheat Acquisition) Regulations and the order of the Minister of State for Commerce made thereunder.

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(4) 71 C. L. R. 115, 122 et seq.

(5) (1943) 44 N. S. W. St. R. 19, 26.

(6) [1950] A. C. 235.

(7) [1917] A. C. 528.

(8) (1942) 66 C. L. R. 557.

The respondents at the outset of the proceedings in this appeal tabled a plea that the appeal did not lie without a certificate of the High Court. The right to take this preliminary plea had not been reserved, as it was in *Commonwealth of Australia* v. *Bank of New South Wales* (the *Banks* case) (9), in the order granting special leave. But it is not in doubt that their Lordships are bound to entertain it, since it is a plea to jurisdiction and no certificate has been sought or granted by the High Court of Australia. The procedure followed in the appeal was similar to that followed in the *Banks* case (9) and counsel have been heard on the merits as well as on the preliminary plea.

The foundation of the plea is s. 74 of the Constitution. It is in the following terms:—

> "No appeal shall be permitted to the Queen in Council "from a decision of the High Court upon any question, how- "soever arising, as to the limits inter se of the constitutional "powers of the Commonwealth and those of any State or "States, or as to the limits inter se of the constitutional "powers of any two or more States, unless the High Court "shall certify that the question is one which ought to be "determined by Her Majesty in Council.
>
> "The High Court may so certify if satisfied that for any "special reason the certificate should be granted, and there- "upon an appeal shall lie to Her Majesty in Council on the "question without further leave.
>
> "Except as provided in this section, this Constitution "shall not impair any right which the Queen may be pleased "to exercise by virtue of Her Royal prerogative to grant "special leave of appeal from the High Court to Her "Majesty in Council. The Parliament may make laws "limiting the matters in which such leave may be asked, "but proposed laws containing any such limitation shall be "reserved by the Governor-General for Her Majesty's "pleasure."

Section 74 has been considered in appeals to His Majesty in Council, notably in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (10) and in the *Banks* case (11), and it will be necessary in due course to discuss the effect of these cases. But it is first necessary, before considering what is meant by a question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State and whether the provisions of s. 74 apply, to describe the circumstances which gave rise to the litigation and the course of procedure which has been followed. Attention may be confined to those matters which are relevant to the present issue, and much that is material to other questions which would arise only if the appeal is competently before their Lordships may be omitted.

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(9) [1950] A. C. 235.
(10) [1917] A. C. 528.
(11) [1950] A. C. 235.

On September 21, 1939, Wheat Acquisition Regulations were made under the National Security Act, 1939. The validity of the Act itself is not questioned by the appellant. The regulations incorporated the Australian Wheat Board, and provide, inter alia, as follows:—

> " 14. For securing the public safety and the defence of " the Commonwealth and the Territories of the Commonwealth, for the efficient prosecution of the war, and for " maintaining supplies and services essential to the life of " the community, the Minister " (being the Minister of State for Commerce) " may, from time to time, by order published " in the Gazette make provision for the acquisition by the " Commonwealth of any wheat described in the order, and " that wheat shall, by force of and in accordance with the " provisions of the order become the absolute property of the " Commonwealth freed from all mortgages, charges, liens, " pledges, interests and trusts affecting that wheat and the " rights and interests of every person in that wheat (including any rights or interests arising in respect of any moneys " advanced in respect of that wheat) are hereby converted " into claims for compensation.
>
> " 15. All persons having wheat acquired by the Commonwealth in their possession control or disposal on the date " of the publication of an order describing that wheat shall, " within fourteen days of that publication, furnish to the " Board a return in accordance with Form A in the schedule " to these Regulations.
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> " 16.—(1) Any person having wheat acquired by the " Commonwealth in his possession, control or disposal may " deliver or consign that wheat to a licensed receiver or, on " receipt of a notice in writing from the Board (or from the " Chairman of a Committee authorized in that behalf by the " Board) requiring him to deliver or consign that wheat to a " licensed receiver specified in the notice, shall deliver or " consign (as the case may be) the wheat to that licensed " receiver within the time specified in the notice;

" (2) Notwithstanding anything contained in sub-regula-
" tion (1) of this Regulation, no person shall, on or after the
" date of the commencement of this sub-regulation, deliver
" any wheat acquired by the Commonwealth which was
" harvested prior to the first day of September, 1939, and
" which is stored on a farm on the date of the commencement
" of this sub-regulation, to a licensed receiver or to any other
" person whomsoever except in accordance with instructions
" from the Board or with the approval of the Board and in
" either case in accordance with such terms and conditions
" as the Board may impose;

" (3) Any person who, on the date of the commencement
" of this sub-regulation, has in his possession control or dis-
" posal any wheat acquired by the Commonwealth which is
" stored on a farm and which was harvested prior to the 1st
" day of September, 1939, shall, within fourteen days from
" the commencement of this sub-regulation, forward to the
" Board a return in accordance with the Form AA in the
" schedule to these Regulations.

" 17. Except as provided in Regulation 16 of these Regu-
" lations, or with the consent of the Board, no person shall—

" (*a*) part with the possession of any wheat acquired
" by the Commonwealth which is held in his possession;

" (*b*) take into his possession any wheat which has
" been acquired by the Commonwealth other than wheat
" which he purchases from the Commonwealth; or

" (*c*) purport to sell or offer for sale, or purport to
" buy or offer to buy (otherwise than from the Common-
" wealth) any wheat which is the property of the
" Commonwealth."

" 19.—(1) Upon delivery or consignment of any wheat in
" accordance with Regulation 16 of these Regulations (or in
" the case of wheat acquired by the Commonwealth to which
" sub-regulation (2) of Regulation 16 of these Regulations
" applies, after the date of the commencement of that sub-
" regulation) every person having any right or interest in that
" wheat may forward to the Board a claim for compensation
" in accordance with Form B in the schedule to these Regu-
" lations and shall be entitled to be paid such amount of
" compensation as the Minister, on the recommendation of
" the Board, determines:

" (2) It shall not be necessary for the Minister to make
" a determination in pursuance of sub-regulation (1) of this
" regulation until, in his opinion, a sufficient quantity of any
" wheat acquired by the Commonwealth has been disposed
" of to enable the Board to make a just recommendation,

" but the Minister may, in his absolute discretion, make any " payment on account of any claim notwithstanding that no " determination in respect of that claim has been made:

" (2A) The basis of the compensation to be recommended " by the Board shall be the rate or rates per bushel arrived " at by reference to the surplus proceeds from the disposal of " wheat, but from the compensation determined by the " Minister, the Board may make deductions on account of " any or all of the following:—

" (*a*) the price or value of corn sacks (including " freight thereon) supplied to the wheatgrower or which, " in the opinion of the Board, form a proper charge " against the proceeds of the wheat:

" (*b*) railway freight from the country siding to the " terminal port; and

" (*c*) dockages or deductions as fixed by the Board on " account of the quality or condition of the wheat or " corn sacks."

" 25. The Commonwealth may purchase any wheat and " may use or sell or otherwise dispose of any wheat acquired " or purchased by it as it deems necessary for securing the " public safety and the defence of the Commonwealth and " the Territories of the Commonwealth, for the efficient " prosecution of the war, or for maintaining supplies and " services essential to the life of the community."

" 26. On behalf of the Commonwealth and subject to any " directions of the Minister, the Board may—

" (*a*) purchase any wheat, wheat products or corn " sacks;

" (*b*) sell or dispose of any wheat, wheat products or " corn sacks acquired or purchased by the Commonwealth;

" (*c*) grist or arrange for the gristing of any wheat " into flour and sell or otherwise dispose of that flour;

" (*d*) manage and control all matters connected with " the handling, storage, protection, treatment, transfer " or shipment of any wheat acquired by the Commonwealth or of any wheat or flour sold or disposed of by " the Commonwealth or by the Board on behalf of the " Commonwealth;

" (*da*) carry, in any ship chartered by it for the " carriage of wheat or flour, any other commodity at " such rates of freight as the Board, subject to any " directions of the Minister, determines; and

" (*e*) do all matters which it is required by these

" Regulations to do or which are necessary or convenient " for giving effect to these Regulations.

" 27.—(1) The Board shall open and maintain an account " at the Commonwealth Bank of Australia into which it shall " pay all moneys received in respect of sales of wheat or " wheat products or otherwise, and any moneys appropriated " by the Parliament or borrowed by the Minister for use by " the Board on behalf of the Commonwealth.

" (2) Out of moneys standing to the credit of the account " the Board shall defray all costs and expenses of administering these Regulations and make all payments in respect of " compensation and any other payments authorized to be " made by these Regulations.

" (3) The accounts of the Board shall be subject to audit " by the Auditor-General."

On November 16, 1939, the then Minister of State for Commerce, purporting to act pursuant to the Regulations, by order published in the Commonwealth Government Gazette declared that the following wheat was acquired by the Commonwealth, namely:—

" (*a*) all wheat harvested on or before the eighth day of " October, One thousand nine hundred and thirty-nine which, " on the date of the publication of this Order in the Gazette, " is situate in Australia; and

" (*b*) all wheat which is harvested in Australia on or after " the date of the publication of this Order in the Gazette. " except—

" (*c*) wheat stored by the grower thereof on his farm for " his own use (other than gristing) and which is not for sale;

" (*d*) wheat, to the extent to which it does not exceed one " hundred bushels, stored by or on behalf of the grower thereof " for the purpose of gristing the wheat into products to be " used by the grower;

" (*e*) wheat stored by the grower thereof which has been " sold to another grower for use as seed wheat; and

" (*f*) in such cases as the Australian Wheat Board " approves, wheat which has been sold by the grower thereof " to any person for use as seed wheat either by that person " or by a purchaser from that person."

The validity of this order is not now disputed.

The appellant owns property in New South Wales, a large part of which is used for growing wheat. On the footing that the regulations and order were valid the wheat grown by the appellant in the cereal year beginning December 1, 1945, and ending November 30, 1946, became, on harvesting, the property of the Australian Wheat Board, and the appellant delivered in that cereal year 14,284 bushels of wheat to the Board. On delivery the appellant claimed compensation "in accordance with the Wheat Acquisition Regulations", and it subsequently received from the Australian Wheat Board certain sums as advances towards the compensation claimed.

On July 24, 1946, the appellant began proceedings against the respondents claiming (1.) a declaration that the National (Wheat Acquisition) Regulations were invalid; (2.) a declaration that reg. 19 of these regulations was invalid; (3.) a declaration that the order of November 16, 1939, was invalid; (4.) compensation for the acquisition by the Commonwealth of the appellant's 1945–46 wheat crop; (5.) a claim for interest. To the fourth claim there was (6.) an alternative claim for damages on the basis of conversion of the wheat; and (7.) a further alternative claim on the basis of an agreement by the Wheat Board to purchase the appellant's wheat at a price to be ascertained in accordance with its fair market value. Of these claims the first, third and fifth have been abandoned; and the sixth and seventh are not material to the present issue.

The fourth claim is a claim for the value of the wheat to the appellant at the date of acquisition. It is a claim under reg. 14. Logically there are two alternative bases for it. One is that regs. 14 and 19 each provide a separate mode of assessing compensation; reg. 14 by converting the appellant's property into a claim for compensation based on the general principle of payment of the value at the date of acquisition, and reg. 19 by providing for payments by the Board based on a rate per bushel arrived at by reference to the surplus proceeds from the disposal of wheat by the Board and subject to the other provisions of reg. 19. So far there is no attack on the validity of this regulation and no inter se question. The other alternative needs more detailed explanation. It presupposes that regs. 14 and 19, on a sound construction of their terms, do not each provide a separate mode of assessing compensation, but that there is only one mode, that provided by reg. 19. It also presupposes that reg. 19 is invalid as in excess of the Commonwealth Parliament's power under s. 51, placitum xxxi, of the Constitution "to make laws for the peace, "order, and good government of the Commonwealth with respect "to the acquisition of property on just terms from any State or "person for any purpose in respect of which the Parliament has "power to make laws". And, thirdly, it presupposes that reg. 19, by virtue of s. 46 (*b*) of the Acts Interpretation Act, 1901–48, may be treated as severable from the other regulations, with the consequence that the acquisition would be valid and that compensation under reg. 14 would be assessed on the basis of value at the date of acquisition. The respondents contend that the question whether reg. 19 is invalid as being ultra vires of placitum xxxi is an inter se question. In the statement of defence it should be noted that they alleged that the appellant's conduct in claiming compensation under the regulations at the date when the wheat was delivered, and in subsequently accepting the advances to which reference has been made, amounted to an election to accept compensation under the provisions of reg. 19.

The action was heard by Williams J., who held, on the authority of *Andrews* v. *Howell* (12) and *Australian Apple and Pear Board* v. *Tonking* (13), that regs. 14 and 19 each provided a separate means of assessing compensation, but that the sum at which he would have assessed the appellant's claim under reg. 14 was less than the sum which the respondents were willing to pay under reg. 19. He dismissed the action. The validity of reg. 19 was not called in question in argument before him.

The appeal from his decision was heard before the Full Court of the High Court of Australia. It is clear from the judgment of the Chief Justice that no argument was presented against the validity of reg. 19. He therefore assumed its validity, and he was for dismissing the appeal on the ground, inter alia, that the appellant had elected to take the compensation provided by reg. 19. McTiernan and Webb JJ. were in substantial agreement with the Chief Justice. Rich J. agreed with the reasons and conclusions of the trial judge, except on points not material to the present issue, one of which involved the allowance of the appeal on the technical ground that the appellant was entitled to a decree for the amount of compensation as assessed under reg. 14 by the trial judge. Starke J. held that reg. 19 contravened the constitutional limitation contained in placitum xxxi and that reg. 14 was severable. The acquisition was therefore valid, and compensation fell to be assessed under reg. 14 on general principles. He therefore would have given effect substantially to the fourth claim. Dixon J. said that if he had been free so to decide he would have held that the meaning of the Wheat Acquisition Regulations was that every grower should be compensated by payments under reg. 19 and not otherwise, and further that reg. 19 was not necessarily inconsistent with just terms and therefore not in excess of the Commonwealth powers conferred by s. 51, placitum xxxi. But in view of the refusal of counsel for the Commonwealth to distinguish the instant case from the previous decisions of the High Court in *Tonking's* case (14) and *Andrews* v. *Howell* (15) he dealt with the case on the footing that the wheat was validly acquired and that the appellant was entitled to compensation under reg. 14 on ordinary principles, namely, payment of the value of the wheat acquired.

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(12) (1941) 65 C. L. R. 255.

(13) (1942) 66 C. L. R. 77.

(14) Ibid. 77.

(15) 65 C. L. R. 255.

On this basis he sustained, subject to minor modifications, the appellant's fourth claim.

As the judges of the High Court were evenly divided on the question whether the appeal should be allowed, the appeal was dismissed by virtue of the provisions of s. 23, sub-s. 2, of the Judiciary Act, 1903–47.

It is apparent from the foregoing summary of the judgments in the High Court that the question of the validity of reg. 19 was a matter which obtruded itself on judicial attention, though it was not argued by counsel, and that the issue of validity might well become prominent in any subsequent appeal to His Majesty in Council. And so it proved, for one of the reasons in the appellant's case is:—" because compensation should not be assessed " under reg. 19 of the Wheat Acquisition Regulations by reason " of the fact that such regulation was invalid as not providing for " just terms under s. 51 of the Commonwealth of Australia " Constitution Act, 1900 ". In the body of the appellant's case it is narrated that the appellant had formally submitted to the High Court of Australia that the regulations were invalid, but did not argue the point, having regard to the decision in *Tonking's* case. It was, moreover, submitted in the case that in so far as the question of the validity of the National Security (Wheat Acquisition) Regulations and in particular the validity of reg. 19 might become material in the consideration of the appeal, reg. 19 was invalid. One reason for stating this submission in this conditional form is that it might be possible for the appellant to succeed in the appeal without attacking the validity of reg. 19, if he could obtain a decision that regs. 14 and 19 on a true construction of their terms provided alternative modes of assessing compensation. It must further be noticed that the finding by the Chief Justice and McTiernan and Webb JJ. that the appellant had elected to take compensation under reg. 19 brought the question of its validity into the foreground of the appeal. For that finding was based on the assumption that the regulation was valid. The finding might be shown to be unjustified on the evidence, but another obvious answer to the defence of election is that reg. 19 was null and void and that there was therefore no scope for election.

To sum up, the position is that the appellant might succeed in this appeal if it abandoned its attack on the validity of reg. 19, and obtained a decision that regs. 14 and 19 provided alternative modes of compensation and that the appellant's conduct did not amount to an election. But the appellant did not abandon the attack on the validity of reg. 19, and in his argument at the hearing of the appeal the appellant's counsel contended that reg. 19 did not provide just terms, because, inter alia, the Board was not bound to obtain the best possible price for the wheat

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handled by it and was subject to ministerial control both as regards the use and disposal of the wheat and as regards the payments to be made to wheat growers. Their Lordships need not, for the purpose of deciding the question of their jurisdiction, say more than that the argument against the validity of reg. 19 was formidable and that it could not have been disposed of without the most serious consideration.

These, then, are the circumstances relevant to the question of the jurisdiction of His Majesty in Council which has now to be determined. The appellant denies that the question whether reg. 19 provides for acquisition on just terms is a question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State, and it submits also that the appeal is not an appeal upon any such question nor an appeal from a decision on any such question. The respondents maintain that all questions whether the Commonwealth has exceeded a power conferred on it by s. 51 of the Constitution are inter se questions, and that the question whether just terms are provided by reg. 19 is one on which their Lordships are invited by the appellant to determine, and is in any event one which their Lordships would find it necessary to determine if the appeal were permitted to proceed to a final conclusion on the merits. These are the broad contentions of the parties and they involve two logically separate issues which depend on the construction of s. 51 and of s. 74 of the Constitution.

Their Lordships, in approaching these issues, deem it expedient to recall certain broad considerations which are more than prolegomena since they bear on the construction of s. 51 of the Constitution and are relevant to every dispute affecting the limits of the powers of the States and the Commonwealth. Before the Australian Commonwealth Constitution was framed the States enjoyed sovereign powers of legislature. The sovereign powers of the States were not abrogated, though they were in some respects limited, by the Constitution of the Commonwealth. Thus s. 107 of the Constitution provides that every power of the Parliaments of the member States continues as it was at the establishment of the Commonwealth unless it is by the Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliaments of the States. Sections 52 and 69 may be referred to as examples of powers exclusively vested in the Commonwealth Parliament, and s. 92 as an example of a power withdrawn from the Parliaments of the States and equally denied to the Parliament of the Commonwealth. This saving of the States' powers was the foundation of the agreement narrated in the preamble to the Constitution by which the people of the States agreed to unite in one indissoluble Federal Commonwealth. But it was also part of the agreement to federate that the Constitution should grant to the Commonwealth Parliament powers to make laws for the peace, order and good government of the Commonwealth without declaring them to be exclusive. Section 51 grants such powers, subdividing them according to subject-matter in the thirty-nine placita comprised in it.

Where the Constitution has declared that neither the Commonwealth nor the States shall have power to make laws of a certain effect and it is alleged that the Commonwealth or a State has trespassed against the prohibition there can be no question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State, and the only question for judicial decision is whether a particular enactment or administrative proceeding has trespassed against the prohibition. This principle has been firmly established, and it was in accordance with it that in the *Banks* case (16) it was accepted that no inter se question could arise under s. 92. Equally, when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits inter se of the powers of the Commonwealth and those of any State, and on this point the reasoning of Dixon J. in *Ex parte Nelson (No.* 2) (17) appears to their Lordships to be conclusive. But s. 51 does not expressly divest the States of any power, and it falls to the courts to determine where the limits of the States' powers and the limits of the Commonwealth powers are fixed. These questions of the limits of power spring from the Constitution and they are questions as to the limits inter se of the powers of the Commonwealth and the States. If there were doubt that this must be so in principle, it would be settled by the authority of *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (18), where the appellants challenged the validity of an award by the President of a Court constituted by the Commonwealth Parliament under placitum xxxv, for "conciliation and "arbitration for the prevention and settlement of industrial "disputes extending beyond the limits of any one State". The award dealt with hours of work, wages, payment for overtime and work done on holidays, compensation for accidents and other terms and conditions of the employment of building employees throughout Australia. One of the grounds of challenge was that there was no industrial dispute extending beyond the limits of any one State. The High Court of Australia had found against the appellants on this issue of fact. The appellants then applied to the High Court for a certificate under s. 74. The application was refused, but the Judicial Committee granted special leave to appeal, reserving liberty to the respondents to contend at the

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(16) [1950] A. C. 235.
(17) (1929) 42 C. L. R. 258, 272.
(18) [1917] A. C. 528.

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hearing that the appeal was incompetent. At the hearing the jurisdiction of His Majesty in Council was challenged by the respondents. The argument was that s. 51 is not one of the sections conferring exclusive powers on the Commonwealth and that any decision as to the meaning of placitum xxxv and the extent of the powers thereby conferred was in effect a decision as to the limits inter se of the powers of the Commonwealth and the States. This contention was sustained. Their Lordships declined to express any opinion as to the power of the States under their own Constitutions to settle industrial disputes within their own borders, even though they had extended into other States, because that itself was a question for the High Court to determine. The judgment then proceeded (19): " Whatever may " be the power of the Commonwealth in regard to industrial dis- " putes, whether or not that power must be exerted in harmony " with State laws or State awards, it is at all events clear that " the field of legislation and of consequent determination in " obedience to laws so made is divided between State and Com- " monwealth, and these are constitutional powers because they " spring from constitutional sources. The able but necessarily " difficult arguments of Mr. Lawrence and Mr. Romer were " directed to show that the decision of the High Court on the " present case was not upon a question as to the limits inter se " of Commonwealth and State powers. They said that it did not " decide any conflict of powers and could not impair the power " of the State, and therefore was not concerned with limits inter " se, laying emphasis upon the two Latin words. Let it be " supposed that no conflict has arisen and that the powers of the " State could not be so impaired. These considerations do not, " in their Lordships' opinion, furnish the test. Their Lordships " consider that the High Court decided, first, that the dispute " before them was one extending beyond the limits of one " State; and secondly, that the President had jurisdiction to " make his award under the legislation of the Commonwealth " passed pursuant to their constitutional powers. The High " Court decided that the frontier of the Commonwealth power " reaches in this case into the State, and it therefore followed " that the State has not exclusive, if any, power in this case. " This appears to their Lordships to be a question as to the limits " inter se of the several powers, however much or little the " Commonwealth may be required to conform to State laws or " State awards, and however much or little the State may impose " laws upon its own subjects ".

The far reaching effect of this decision has been recognized in the High Court of Australia. In *Australian National Airways*

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(19) [1917] A. C. 532.

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Pty. Ld. v. *The Commonwealth* (20), Dixon J. referred to it and said: "The settled interpretation of the crucial words of s. 74 "... is that they cover any decision upon the extent of a paramount power of the Commonwealth", and he pointed out that the only logical alternative would be to treat them as covering the demarcation of the boundary between the exclusive powers of the Commonwealth and the powers of the States and perhaps the relation between the constitutional powers of one organ of the Federal system and the immunities of another organ and the exercise of its powers.

The appellant, while not admitting the broad principle thus stated, submitted that in any event placitum xxxi should, on account of its special subject-matter, be treated as exceptional. It is therefore necessary now to consider the meaning and effect of the placitum. On this their Lordships find no substantial doubt or difficulty. The placitum creates a power to acquire property for Commonwealth purposes; but it is a power sub modo, for it is a power to acquire on just terms and not otherwise. In this sense it is, as Dixon J. said in the present case, a power to make laws with respect to a compound conception, namely, "acquisition-on-just-terms". So far the Commonwealth is authorized, beyond that it has no authority to acquire property in any State. The exercise of the power is conditional on the observance of the constitutional limitation, just as under placitum xxxv the exercise of the power is conditional on the existence of the constitutional limitation that there should be a dispute extending beyond the bounds of any one State. Under either placitum the question whether the constitutional limitation of the Commonwealth power had been exceeded raises the question how far the constitutional power of the Commonwealth reaches into the State and how far, if at all, the States' power has been affected by the Commonwealth power. Each of these questions requires the court to determine, on a construction of the Constitution, the limitations of the powers of the Commonwealth and of the States inter se.

The appellant's argument that no inter se question arises unless a decision that the impugned exercise of a Commonwealth power was valid would result either in the annihilation of a State power or in the subordination of a State power, by virtue of s. 109 of the Constitution, to the impugned enactment, is inconsistent with the ratio decidendi of *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (21). Their Lordships in that case refused to consider what the power of the State was, because that was itself a question for the High Court, and because the question whether the powers of the State would be impaired was not the test.

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(20) (1946) 71 C. L. R. 115, 122–3.

(21) [1917] A. C. 528.

Counsel for the appellant then submitted that the validity of reg. 19 was not truly the issue. The only question, he said, was one of construction aided by s. 46 (*b*) of the Acts Interpretation Act, 1901–1948. According to the argument the regulations had a primary and secondary intention; an intention at all events to acquire the wheat, and an intention, if possible, to acquire it on the terms provided by reg. 19. If these terms were not just terms then, by construction, the regulations were an enactment to acquire subject to rights of compensation assessed on general principles. The fallacy of this argument is transparent. Section 46 (*b*) has no application save in a case where the regulations "would but for the section have been construed as being in excess "of the power".

Next it was said that since reg. 19 was admittedly severable and the acquisition of the wheat was admittedly valid under the regulations excluding reg. 19, there had never been from the date of the order of November 16 any wheat on which a State power of acquisition could operate, and therefore no possibility of conflict between the exercise of the Commonwealth power and any exercise of a State power. These are, in their Lordships' view, irrelevant circumstances. What is reserved to the jurisdiction of the High Court, and, subject to the granting of a certificate, excluded from the jurisdiction of His Majesty in Council, is a question of powers, and a constitutional power may exist though there is no present intention or opportunity to use it.

It was also said that the question of the validity of a regulation made by the Governor-General under powers conferred by the National Security Act (the validity of which was not challenged) was not a constitutional question involving the power of the Commonwealth Parliament, but only a question whether the Governor-General had exceeded the power delegated to him. The answer to this is, first, that s. 74 is concerned with the constitutional powers of the Commonwealth and its agencies and those of the States and their agencies, and is not confined to legislative powers; second, that the legislation of the Commonwealth, whether enacted by the Commonwealth Parliament itself or by the Governor-General under its delegation, must not exceed the powers conferred by the Commonwealth Constitution; and third, that the argument is inconsistent with the decision in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (21), where the issue of the validity of an award of the court set up under Commonwealth legislation was held to be an inter se question.

Their Lordships therefore conclude that the attack on the validity of reg. 19 on the ground that it does not provide just

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terms within the meaning of s. 51, placitum xxxi, raises an inter se question.

On that hypothesis, it was nevertheless maintained for the appellant that the provisions of s. 74 did not apply. The argument was that s. 74 concerned the jurisdiction of His Majesty in Council, and that their Lordships were bound to entertain the appeal unless it was apparent in limine that they must necessarily determine an inter se question if the appeal were to proceed. As has been already explained, the appellant might succeed in obtaining a favourable decision of the appeal without a determination on the validity of reg. 19. From this the appellant's argument advanced to the second proposition, that if their Lordships, having in accordance with the first proposition entertained the appeal, found at a later stage that the appeal could not be decided without determining the validity of reg. 19, they must determine that question and go on to dispose of the appeal.

Their Lordships are of opinion that neither of these propositions can be sustained. In the *Banks* case (22) their Lordships took occasion to emphasize that " in the establishment of the " Federal Constitution of the Commonwealth of Australia it was a " matter of high policy to reserve for the jurisdiction of her own " High Court the solution of those inter se questions which were " of such vital importance to Commonwealth and States alike ". Section 74 in fact was part of that bargain to which the members of the Federation gave their consent when they entered the Federation, and it ought to be construed, as it was construed in the *Banks* case (22), broadly and so as to give effect to the purpose for which it was enacted. Their Lordships are not disposed to allow exceptions to the broad construction which they have already adopted, that an appeal involving the determination of any inter se question is excluded from the jurisdiction of His Majesty in Council unless the appellant has obtained a certificate from the High Court. In the *Banks* case (22) the appellants did not seek the reversal of any determination by the High Court on an inter se question. But the respondents did, and they maintained that the appellants could only succeed in their appeal if they obtained a favourable decision on the inter se questions. It therefore became necessary to consider whether the determination of the inter se questions was necessarily involved in the appeal. It was held that it was, and that the appeal could not proceed without the certificate of the High Court. But it is a misconception of that decision to suppose that their Lordships, if the necessity for determining the inter se questions had appeared not at the outset, but only after they had decided other antecedent questions adversely to the appellants, would have gone on to

(22) [1950] A. C. 235, 293.

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determine the inter se questions which were then seen to be necessary for the decision of the appeal. The plea to jurisdiction is open at all stages of an appeal, and jurisdiction cannot be conferred by an accident of pleading. At whatever stage the plea arises it must be entertained unless it is seen to be frivolous, and if it is sustained the result must be to dismiss the appeal with the effect of affirming the judgment appealed against, even though that judgment may have proceeded on a determination of antecedent questions on which their Lordships have differed from the High Court. The logic of the Constitution may sometimes impose this apparent contradiction between the reasoning and the conclusion of the judgment in the appeal. In this appeal, however, it is the appellant who invites a decision on an inter se question. The rule applicable was thus laid down by the Board in the *Banks* case (23): the appellant may accept the determination of the High Court on the inter se question and present a petition for special leave to appeal on other questions only. But if he insists in his appeal on raising an inter se question, whether as part of his main ground of appeal or as part of an alternative ground of appeal, he must obtain a certificate from the High Court under s. 74.

Their Lordships have therefore no jurisdiction, and they will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay one-half of the respondents' costs of the appeal.

Solicitors: *Barlow, Lyde & Gilbert; Coward, Chance & Co.*

(23) [1950] A. C. 235.

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GRACE BROS. PTY. LIMITED . . . APPELLANT;

AND

COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Appeal to Privy Council—Jurisdiction—Lands Acquisition Act, 1906–36, *ss.* 28, 29, *sub-s.* 1, 40*—Constitutional validity—Inter se question—No certificate of High Court—Appeal incompetent—Commonwealth of Australia Constitution*, 1900 (63 & 64 *Vict.*, *c.* 12), *s.* 51 (xxxi); *s.* 74.

By an order in Council the appellant was granted special leave to appeal to His Majesty in Council from a judgment of the High

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* *Present*: LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD REID.

Court of Australia on, inter alia, the question "whether the "petitioner [appellant] was entitled to be compensated under s. 29, "sub-s. 1, of the Lands Acquisition Act, 1906–36" on the acquisition by the Commonwealth of certain land and a building thereon belonging to the appellant, "or on a common law basis", that was, whether s. 29, sub-s. 1, which required that the land should be valued at a date anterior to the date of acquisition, was ultra vires of s. 51 (xxxi) of the Constitution, which empowered the Commonwealth to acquire property on just terms. Under the Order in Council it was open to the appellant to maintain, and it was in fact submitted in its case, that s. 28 and s. 29, sub-s. 1, did not provide just terms for the assessment of compensation, and that s. 40 did not provide just interest on the compensation due to the appellant.

Held, that any question whether the Commonwealth had exceeded the powers conferred on it by s. 51 of the Constitution was an inter se question, and that the appellant not having acquiesced in the High Court's decision on the validity of the impugned sections, and not having obtained a certificate from the High Court as required by section 74 of the Constitution, the appeal was incompetent.

Nelungaloo Pty. Ld. v. *Commonwealth of Australia* (*ante*, p. 34) applied.

APPEAL (No. 17 of 1950), by special leave, from a judgment and order of the High Court of Australia (April 17, 1946), allowing a demurrer by the respondents to the appellant's statement of claim and dismissing the appellant's motion for an injunction and its suit whereby it challenged the validity of the acquisition by the Commonwealth of its property in Sydney known as the Grace Building.

The following facts and the relevant provisions of the Lands Acquisition Act, 1906–36, are taken from the judgment of the Judicial Committee: The appellant company, which was incorporated according to the laws of New South Wales, was the registered proprietor in New South Wales of certain land on which a large building had been erected. By a notification in the Commonwealth of Australia Gazette on November 8, 1945, the Commonwealth purported to acquire the land and building under the Lands Acquisition Act, 1906–1936. The Commonwealth entered into possession and began alterations and demolitions. The appellant thereupon commenced a suit in the original jurisdiction of the High Court of Australia against the Commonwealth and the Minister of State for the Interior, the respondents in this appeal. In the writ of summons the appellant claimed a declaration that the notification was void as not complying with the Lands Acquisition Act; a declaration that the Lands Aquisition Act was ultra vires of the Constitution of the Commonwealth of Australia, s. 51, placitum xxxi; and an alternative declaration that s. 29 of the said Act was ultra vires of that same section and placitum. There was a claim for an injunction against entering on or interfering with the land and premises, or selling, mortgaging, alienating, charging or encumbering or otherwise dealing with them, and a claim for damages.

The respondents demurred to the statement of claim on, inter alia, the ground that the Lands Acquisition Act and every part thereof was a valid exercise of the legislative power of the Commonwealth of Australia.

The material provisions of the Lands Acquisition Act were as follows:—

> " 13. The Commonwealth may acquire any land for public " purposes—
>
> "(*a*) by agreement with the owner; or
>
> "(*b*) by compulsory process."
>
> " 15.—(1) The Governor-General may direct that any land " may be acquired by the Commonwealth from the owner by " compulsory process.
>
> "(2) The Governor-General may thereupon, by notification " published in the Gazette, declare that the land has been " acquired under this Act for the public purpose therein " expressed.
>
> "(3) A copy of the notification shall be laid before both " Houses of the Parliament within fourteen days after its " publication in the Gazette if the Parliament is then sitting, " and if not then within fourteen days after the next meeting " of the Parliament.
>
> " 16.—(1) Upon the publication of the notification in the " Gazette, the land described therein shall, by force of this " Act—
>
> "(*a*) be vested in the Commonwealth; and
>
> "(*b*) be freed and discharged from all trusts, obliga" tions, estates, interests, contracts, licences, charges, " rates, and easements,
>
> " to the intent that the legal estate therein, together with all " rights and powers incident thereto or conferred by this Act, " shall be vested in the Commonwealth."
>
> " 17. Upon the publication of the notification in the " Gazette, the estate and interest of every person entitled to " the land specified in the notification, and the title of the " State to any Crown land specified in the notification, shall " be taken to have been converted into a claim for compensa" tion."
>
> " 26. Where any land (other than Crown land) is acquired " by compulsory process, the owner of the land shall, if " deprived of the land in whole or in part, be entitled to " compensation under this Act."

"28.—(1) In determining the compensation under this "Act, regard shall be had (subject to this Act) to the following "matters:—

"(a) The value of the land acquired;

"(b) The damage caused by the severance of the land "acquired from other land of the person entitled to "compensation; and

"(c) The enhancement or depreciation in value of other "land adjoining the land taken or severed therefrom of "the person entitled to compensation by reason of the "carrying out of the public purpose for which the "acquired land was acquired.

"(2) The enhancement or depreciation in value shall be "set off against or added to the amount of the value and "damage specified in paragraphs (a) and (b) of sub-section (1) "of this section.

"29.—(1) The value of any land acquired by compulsory "process shall be assessed as follows:—

"(a) In the case of land acquired for a public purpose "not authorized by a Special Act, according to the value "of the land on the first day of January last preceding "the date of acquisition; and

"(b) In the case of land acquired for a public purpose "authorized by a Special Act, according to the value of the "land on the first day of January last preceding the first "day of the Parliament in which the Special Act was "passed.

"(2) The value of the land shall be assessed without "reference to any increase in value arising from the proposal "to carry out the public purpose."

"36. Subject to this Act, a disputed claim for compensa-"tion may be determined as follows:—

"(a) By agreement between the Minister and the "claimant; or

"(b) By an action for compensation by the claimant "against the Commonwealth; or

"(c) By a proceeding in a Federal or State Court on "the application of the Minister."

"40. Compensation shall bear interest at the rate of three "per centum per annum from the date of the acquisition of "the land, or the time when the right to compensation arose, "until payment thereof is made to the claimant or until the "amount thereof has been deposited in the Treasury.

"Provided that, where the compensation awarded in an "action for compensation, or determined in a judicial "proceeding, is not more than the amount offered by the

"Minister in satisfaction of the claim for compensation, the "compensation shall only bear interest to the date when "the offer of the Minister is communicated to the claimant."

The appellant moved for an injunction restraining the respondents from selling, disposing, leasing, further altering, demolishing, or otherwise dealing or interfering with the land or buildings, and by an order made by Williams J. that motion was referred to the Full Court of the High Court for hearing at the same time as the demurrer in the action.

At the hearing before the Full Court the appellant maintained that the Act was invalid as failing to provide just terms of compensation and was therefore ultra vires of s. 51, placitum xxxi, of the Constitution, which empowered the Commonwealth to acquire property on just terms. It was argued that s. 29, sub-s. 1, of the Act, since it required that the land should be valued at a date anterior to the date of acquisition, did not give the owner just terms; it was argued also that s. 28, sub-s. 1 (*a*), failed to provide for the assessment of compensation on the basis of the value of the land to the expropriated owner. The provision of s. 40, that compensation should bear interest at the rate of 3 per cent. from the date of acquisition until payment, was attacked on the ground, inter alia, that a fixed rate of interest which disregarded the fluctuations of interest rates was unjust. It was also said that the failure to make moneys legally available for the payment of compensation, so that the actual payment to the expropriated owner was dependent on Parliamentary application, was unjust. The respondents maintained that the Act in its entirety was within the power conferred by s. 51, placitum xxxi, and valid. The Full Court allowed the demurrer, dismissed the motion for injunction and dismissed the action. Latham C.J., and Starke, Dixon and McTiernan JJ. rejected all the submissions for the appellant. Williams J., who concurred on all other points, held that s. 29, sub-s. 1, of the Act did not provide just terms because it fixed a date anterior to the acquisition of the land as the date on which the value should be ascertained, but that by the operation of s. 15A of the Acts Interpretation Act, 1901–34, s. 29, sub-s. 1, was severable. He therefore was of opinion that the demurrer should be overruled and that the motion for an injunction should be dismissed.

An application for special leave to appeal was thereafter presented to His Majesty in Council, and leave was granted as to the following questions:—namely, "(*a*) whether the petitioner "is entitled to be compensated under s. 29, sub-s. 1, of the Lands "Acquisition Act, 1906–36, or upon a common law basis (i.e., "whether s. 29, sub-s. 1, is ultra vires or not), and (*b*) as to the "principle upon which such compensation is to be given; but not "as to the question whether the actual acquisition under the said "Act is invalid."

1950. July 3, 4, 5 and 6. *A. R. Taylor K.C.* (Australian Bar), *Gahan*, and *R. Else-Mitchell* (Australian Bar) for the respondents, took a preliminary objection to the competence of the appeal. The appeal is incompetent on the ground that as to the question whether s. 29, sub-s. 1, of the Lands Acquisition Act is valid the appeal is one from a decision of the High Court on a question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States in respect of which a certificate is required under s. 74 of the Commonwealth of Australia Constitution. No such certificate was obtained. It was said by the appellant that s. 29, sub-s. 1, of the Lands Acquisition Act, by reason of the ante-dating of the ascertainment of value to January 1, had an effect which resulted in the terms not being just—that it did not provide just terms within the meaning of placitum xxxi of s. 51 of the Constitution and was therefore ultra vires and invalid. Once the court is called upon to determine the question of the power of the Commonwealth to make laws under any head of power a question inter se must arise. Any limitation on the power, e.g., that just terms means money's worth, whatever that may mean, has placed a very real restriction on Commonwealth legislative powers, and leaves a much wider power in the State legislature to operate free of competition. If it is a power to make laws in respect to a subject-matter it must be conceded that the State may also make laws on that subject-matter. In so far as the Commonwealth power does not extend the State may exercise its sovereign power without fear of competition with the Commonwealth, and that must be the position with respect to every placitum of s. 51 of the Constitution. An inter se point is involved in this appeal and a certificate under s. 74 was necessary. The appeal is incompetent.

G. E. Barwick K.C. (of the Australian Bar) and *Gilbert Dare* for the appellant. Section 74 does not directly affect this case. It purports to preclude an appeal from a decision of the High Court as to the limits inter se of the constitutional power. It is submitted, first, that it is directed to litigation inter partes, and secondly, that appeals of a certain nature are not to be permitted. This Board held in *Commonwealth of Australia* v. *Bank of New South Wales* (1) that the appeal which is precluded is one in which the relief cannot be granted without the determination by the Board of an inter se question. What the Board has held is that appeals of such a nature that they cannot be resolved in the sense in which the appellant would seek to have them resolved without of necessity deciding an inter se point are not to be permitted. That is really the decision in the *Banks* case (1), and no more. Section 74 admittedly goes to jurisdiction, and strikes at it from the very outset. It must therefore appear at the outset that the inter se question must necessarily be decided in order to give the appellant his relief. The emphasis is on "necessarily." It cannot be said that it is an appeal of that description if the most that can be said is that it may be that at some stage in the hearing an inter se question might be reached. Until it can be said that at the outset it raises an inter se point the appeal is not branded with the quality.

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(1) [1950] A. C. 235.

Next, s. 74 is directed to particular questions inter partes; it is a question in particular litigation, and the question which arises in the particular litigation must be one as to the mutual limits of the constitutional power. So it is necessary to identify the question, state it, and ask whether its decision involves limits inter se. The High Court must be able to write it out in the certificate. Limits inter se means that the mutual boundary of power is involved: *Ex parte Nelson No. 2* (2). Strictly, an inter se question involving a mutual boundary is only to be found in the case of an exclusive power, because that is the only point at which the powers meet. It has been said that an inter se point cannot be found in concurrent powers; but the theory is that in the case of a concurrent power each power is absolute within its own area, and as by construction one power is increased the absolute quality of the other is reduced: *Ex parte Nelson No. 2* (3). The theory is that there does arise a question inter se if by the decision the otherwise absolute power of the State is rendered liable to restraint by reason of s. 109 of the Constitution, which provides that when a law of the State is inconsistent with a law of the Commonwealth the latter shall prevail. The same idea is present in *Australian National Airways Pty. Ld.* v. *The Commonwealth* (4). It is not enough to say in any particular case that the Commonwealth has the power; it must be said that it has it at the expense of the State. It cannot be said that every decision as to the validity of a federal statute under s. 51 of the Constitution raises an inter se question, and this is certainly critical of the argument for the respondents. There appears to be no decision in Australia, except *Hopper* v. *Egg and Egg Pulp Marketing Board (Vict.)* (5), that every challenge to validity qua s. 51 is an inter se question.

The Commonwealth power is not reduced when it is said that it must do something only on just terms. The particular question in the present case is whether the terms were just, and that would not raise an inter se point. In this case, therefore, the appellant does not face a s. 74 point at all. Because just terms may have to be construed so as to narrow the Commonwealth power does not make it a decision inter se. On what is an inter se point, see the judgments of Rich and Dixon JJ. in *Ex parte Nelson No. 2* (6). The next question is, how is any State constitutional power affected by saying that s. 29, sub-s. 1, affords the basis for compensating the appellant? The Attorney-General for a State could not say that his constitutional position is going to be affected by a decision as to the nature of the terms which the Commonwealth may force on those people from whom it acquires property. To deny the Commonwealth power to enforce this power does not touch the States at all in their power. The requirement of just terms is only a limitation on Commonwealth power, and a decision on the question in respect of which leave has been granted in this case cannot affect the State's power. An authority to take, even the same property, can exist both in the State and in the Commonwealth without conflict; if one of the two authorities is exercised before the other there is no conflict; if they are both exercised contemporaneously then, perhaps, there would be a conflict of the two executive functions, but that is not a conflict of the constitutional functions: *State of Victoria* v. *The Commonwealth* (7).

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(1) [1950] A. C. 235.

(2) (1929) 42 C. L. R. 258, 263.

(3) Ibid. 270.

(4) (1946) 71 C. L. R. 115, 122.

(5) (1939) 61 C. L. R. 665, 681.

A. R. Taylor K.C. replied. The argument for the appellant is confused between the question of power and that of operation. *State of Victoria* v. *The Commonwealth* (7) was concerned only with the question whether there was any conflict—neither Commonwealth nor State suggested that the Acts were beyond power. Reliance was also placed by the appellant on the judgments of Rich and Dixon JJ. in *Ex parte Nelson No. 2* (6) to establish by some of their observations that the question in the present case is not an inter se one. It is submitted that the reasons of those judges have no bearing on this case to the effect contended, but, on the contrary, support the respondents' contentions. The inter se question arises here because when either the width of the concurrent power or the width of the Commonwealth exclusive power is being dealt with the ambit of State legislative power must be determined. For illustrations of the way in which s. 74 points arise, see *The Commonwealth* v. *Kreglinger & Fernau Ld. and Bardsley* (8). In the present case the inter se question appears plainly on the pleadings—that the whole Act was invalid. There would have been no difficulty in stating the inter se

(6) 42 C. L. R. 267, 270
(7) (1937) 58 C. L. R. 618, 625–36.
(8) (1926) 37 C. L. R. 393.

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question which arose; it could have been copied from the statement of claim—whether the provisions of the Lands Acquisition Act, 1906–36, are within the powers of the Commonwealth Parliament to make. It is inter se because the question whether the Commonwealth Act is valid or not affects the State legislative power—it makes a deal of difference to the State whether the Commonwealth can or cannot exercise the power. In *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (9) the Board refused to hear the appeal because an inter se point was involved.

July 27. The judgment of their Lordships was delivered by LORD NORMAND, who stated the facts and statutory provisions set out above and continued: This appeal is governed by the decision of *Nelungaloo Pty. Ld.* v. *The Commonwealth of Australia* (10).

Under the Order in Council granting special leave to appeal it is open to the appellant to maintain, and it is in fact submitted in the appellant's case, that ss. 28 and 29, sub-s. 1, do not provide just terms for the assessment of compensation, and that s. 40 does not provide just interest on the compensation due to the appellant.

The respondents maintain that the attack on these sections as in excess of the power conferred on the Commonwealth by s. 51, placitum xxxi, involves an inter se question and that an appeal to His Majesty in Council is, by virtue of the provisions of s. 74 of the Constitution, incompetent without a certificate of the High Court. The question for decision is the same as that dealt with by their Lordships in the *Nelungaloo* case (10). It was there decided that any question whether the Commonwealth had exceeded the powers conferred on it by s. 51 was an inter se question. It was decided also that, though the appellant might have succeeded in the appeal without obtaining a determination on the inter se question, yet unless he acquiesced in the High Court's determination on it or obtained a certificate from the High Court, the jurisdiction of His Majesty in Council was excluded. In the present case the appellant has not obtained a certificate and has not acquiesced in the High Court's decision on the validity of the impugned sections, and their Lordships must therefore refuse to entertain the appeal.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellant must bear the costs of the appeal.

Solicitors: *Kimbers, Williams, Sweetland & Stinson*; *Coward, Chance & Co.*

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(9) [1917] A. C. 528.

(10) Ante, p. 34.

J. C.*

1950

Oct. 9.

JOSEPH ZAMMIT BONETT AND OTHERS APPELLANTS;

AND

JOSEPH AXISA AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

Malta—Landlord and tenant—Jurisdiction—Lease of cinema, equipment and goodwill—Claim to recover possession—Business concern—Competency of ordinary courts—Reletting of Urban Property (Regulation) Ordinance, No. XXI of 1931, *s.* 2.

The Reletting of Urban Property (Regulation) Ordinance, 1931 —which in s. 2 defines "premises" as meaning "any urban "immovable property"—applies to immovable property only. It does not apply to leases of business concerns. Accordingly, although the definition of "shop" in s. 2 of the Ordinance includes a "cinema hall", a hall to which is attached the goodwill of an established cinema business and which is furnished and equipped for the carrying on of that business, is not within the scope of the Ordinance.

Accordingly, *held*, that the ordinary courts, and not the Rent Regulation Board set up under the Ordinance, had jurisdiction to entertain proceedings brought by the owners of the cinema, goodwill and equipment to recover possession of the cinema from their lessees.

Judgment of the Court of Appeal, Malta, affirmed.

APPEAL (No. 6 of 1950) from a judgment of the Court of Appeal of Malta (November 29, 1948) which affirmed a judgment of His Majesty's Commercial Court of Malta (May 4, 1948).

The question involved in this appeal was whether the Commercial Court of Malta had jurisdiction in the matter brought before it or whether it lay with a tribunal constituted by an ordinance promulgated to regulate the reletting of urban immovable property in the island.

By a writ of summons issued in the Commercial Court on May 3, 1947, the respondents, as owners of the "Axisa" cinema, situate at No. 5, Tower Road, Sliema, Malta, called on the appellants, who had been let into possession of the cinema under a lease, to show cause why an order should not be made directing them to vacate and surrender the premises, together with the benches, projectors and other equipment. The period covered by the lease had expired. The appellants challenged the jurisdiction of the Commercial Court to try the suit. They maintained that by

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* *Present*: LORD SIMONDS, LORD OAKSEY, SIR JOHN BEAUMONT, THE RT. HON. T. RINFRET (Chief Justice of Canada) and SIR LIONEL LEACH.

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reason of the Reletting of Urban Property (Regulation) Ordinance, No. XXI of 1931 (hereinafter referred to as "the Ordinance"), the Rent Regulation Board, a tribunal set up thereunder, alone had jurisdiction in the matter. The Commercial Court dismissed the appellants' plea of incompetence on the ground that leases of business concerns were not within the purview of the Ordinance, and the lease here was a lease of a business concern. Consequently the Commercial Court granted the respondents a decree for the eviction of the appellants, with costs. In confirming the judgment of the trial court, the Court of Appeal (Sir George Borg P., Ganado and Camilleri JJ.) pointed out that it was in conformity with the view which it had repeatedly upheld.

1950. July 17. *Colombos K.C.* and *T. B. W. Ramsay* for the appellants.

O'Sullivan K.C. and *W. D. Roberts* for the respondents.

Oct. 9. The judgment of their Lordships was delivered by SIR LIONEL LEACH. The respondents based their action on two leases, dated July 29, 1930, and July 2, 1934, respectively, and it will be convenient to examin the provisions contained in these documents before turning to the requirements of the Ordinance. By the earlier deed predecessors in title of the respondents leased the cinema to Alfredo Zammit (now deceased and represented by some of the appellants) for a term of two years, with an option of renewal for a further two years, at a rent of 185*l.* per annum. The lease provided that all improvements made should "be left to the "benefit of the property without any right on the part of the "tenant to any compensation therefor". The premises had previously been used as a cinema, and the tenant undertook not to suspend cinematographic and other shows (except on good and sufficient grounds) in order not to impair the goodwill which attached to the cinema. On October 11, 1930, an inventory was made of the furniture and equipment which the tenant was entitled to use. When this lease was entered into only silent films were shown, but at some date before the second lease was signed the cinema was refurnished and converted into a "talkie" at the expense of the appellants, who obtained a licence to sell wines and spirits on the premises and secured a new entertainments licence.

A dispute arose between the lessors and the lessees with regard to the interpretation of some of the terms of the lease, and more particularly with regard to the question on whom should fall the cost of widening the door of the cinema, a requirement on which the Superintendent of Public Works was insisting. This led to a suit in the Commercial Court (No. 121 of 1931) and to an appeal to the Court of Appeal. Pending the hearing of the appeal a compromise was entered into, and effect to it was given in the lease of July 2, 1934, which was executed in favour of Alfredo Zammit and four other persons. The period was for six years from August 1, 1934, at a rental of 195*l*. per annum, with the option of a further term of six years at the same figure. As in the earlier lease, improvements were to inure to the benefit of the lessors without any right in the lessees to compensation. The lessees bound themselves not to suspend cinematographic shows and other performances, except during the months of July, August and September, or on good and sufficient grounds. Again it was made clear that this provision was inserted in order to preserve to the lessors the goodwill of the cinema. By another clause the lessees bound themselves to change the name of the cinema into another name approved of by the lessors, and to do so within one month from August 1, 1934.

The appellants exercised the option to continue their tenancy for the further term of six years. This expired on July 31, 1946, and on March 26, 1947, the respondents called on them to surrender and hand over the premises on April 30, 1947. The demand was ignored, and consequently the suit was instituted.

As originally promulgated the Ordinance contained a provision that it should continue in force until December 31, 1933, but its operation has been extended by subsequent Ordinances and it was in force at all times material to the suit. Section 2 defines the expression " premises " as meaning " any urban immovable pro- " perty ", and it follows from this that the Ordinance only applies to immovable property. The section defines the expression " shop " as meaning " any premises principally leased for the sale " of any wares or merchandise, whether by wholesale or retail, any " market stall, warehouse and any premises licensed for the sale " of wine and spirits or refreshments, any cinema hall or other " premises principally leased for the exercise therein of any art or " trade ".

Section 4 declares that it shall not be lawful for the lessor at the expiration of the period of tenancy to refuse the renewal of the lease or to raise the rent or impose new conditions for the renewal of the lease without the permission of the board. Where the lessor desires to resume possession of the premises at the termination of the lease s. 9 requires him to apply to the board for permission to do so, and s. 10 sets out the cases in which an application for resumption of possession may be granted. Section 10 contains two clauses, (*a*) and (*b*), but it is only necessary to refer to cl. (*a*). By virtue of that clause the board can grant the permission sought if the tenant has failed to pay the rent punctually, or has caused considerable damage to the premises, or otherwise failed to comply with the conditions of the lease, or has used the premises for a purpose other than that for which they were leased, or has sublet them or made over the lease without the express consent of the lessor. Section 13 provides that where the premises consist in a shop the lessor shall not be entitled to resume possession during the time in which the Ordinance shall be in force, except in the cases mentioned in cl. (*a*) of s. 10 or where the premises belong to, or are administered by, the Government, or are otherwise required by the Government for a public purpose.

The Court of Appeal held that the ordinary courts retained their jurisdiction because the lease included the goodwill, equipment and accessories of the hall. It was observed that by no stretch of imagination could it be said that premises which had for so long been known as a cinema and had been turned into a " talkie " enjoyed no goodwill. The court also held that the fact that a bar had been installed had not turned the premises into a " shop " within the meaning of the Ordinance.

Their Lordships consider that the judgments of the Maltese courts are right. Section 2 of the Ordinance confines the definition of " premises " to urban immovable property. Therefore movable property is outside the purview of the Ordinance. The definition of " shop " includes a cinema hall, but as the Ordinance only applies to immovable property it would not be reasonable to bring within its scope a hall to which is attached the goodwill of an established cinema business and which is furnished and equipped for the carrying on of that business. If the legislative authority had intended a lease such as the one under discussion to fall within the mischief of s. 13 it is difficult to imagine more inappropriate language than that used in the definition section. But the course of events leaves no doubt that it never had any such intention. With the background of repeated declarations of the Court of Appeal that the Ordinance does not apply to leases of business concerns, its operation has been extended on numerous occasions, but no step has been taken to introduce an amendment which would have had the effect of overriding the judgments of the Court of Appeal. As the Ordinance stands in this respect as it stood in 1931, in spite of suitable opportunities for amendment, the only reasonable conclusion is that the Court of Appeal interpreted it in accordance with the intention of the legislature. It may be added that in the course of the arguments their Lordships were informed that until the passing of Ordinance No. XVI of 1944 similar restrictive legislation in respect of dwelling-houses did not apply to furnished premises.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will bear the costs of the appeal.

Solicitors: *Burchells; T. L. Wilson & Co.*

J. C.*

1950

June 29.

NAKKUDA ALI . . . . APPELLANT;

AND

M. F. DE S. JAYARATNE . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Certiorari—Controller of Textiles—Cancellation of licence—"Reasonable grounds to believe" that dealer is unfit to hold licence—Executive, not judicial, action—Controller not amenable to certiorari—Courts Ordinance (R. S. 1938, c. 6), s. 42—Defence (Control of Textiles) Regulations, 1945, reg. 62.

The respondent, the Controller of Textiles in Ceylon, having cancelled the appellant's textile licence under reg. 62 of the Defence (Control of Textiles) Regulations, 1945, which empowered him to do so "where the Controller has reasonable grounds to believe that any "dealer is unfit to be allowed to continue as a dealer", the appellant obtained from the Supreme Court of Ceylon a rule nisi directed to the respondent requiring him to show cause why a mandate in the nature of a writ of certiorari under s. 42 of the Courts Ordinance should not be issued to him for the purpose of quashing his order of cancellation. On appeal by the appellant against the order to the Supreme Court discharging the rule nisi:—

Held, that the range of persons or tribunals that were subject to the Supreme Court's mandate under s. 42 of the Courts Ordinance was not confined to persons who were ejusdem generis with district judges, magistrates or commissioners, and that on the proper construction of the words "other person or tribunal" the Controller of Textiles was not excluded from the ambit of s. 42.

Abdul Thassim v. *Edmund Rodrigo* (*Controller of Textiles*) (1947) 48 C. N. L. R. 121, approved on this point.

When s. 42 gave power to issue those mandates "according to "law" it was the relevant rules of English common law which must guide the practice of the Supreme Court in Ceylon in ascertaining in what circumstances and under what conditions it might be moved for the issue of a prerogative writ. The only relevant criterion by English law was not the general status of the person or body of persons by whom the impugned decision was made, but the nature of the process by which he or they were empowered to arrive at his or their decision. When it was a judicial process or a process analogous to the judicial, certiorari could be granted.

The words in reg. 62, "where the Controller has reasonable "grounds to believe that any dealer is unfit to be allowed to con-"tinue as a dealer", were to be treated as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he could validly exercise the power of cancellation.

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* *Present*: LORD PORTER, LORD OAKSEY, LORD RADCLIFFE, SIR JOHN BEAUMONT and SIR LIONEL LEACH.

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Dicta in *Liversidge* v. *Sir John Anderson* [1942] A. C. 206 discussed in this connexion.

In acting under reg. 62 the Controller was not acting judicially. In truth, when he cancelled a licence he was not determining a question; he was taking executive action to withdraw a privilege because he believed, and had reasonable grounds to believe, that the holder was unfit to retain it. The power conferred on the Controller by reg. 62 stood by itself on the bare words of the regulation, and, if the mere requirement that the Controller must have reasonable grounds of belief was insufficient to oblige him to act judicially, there was nothing else in the context or conditions of his jurisdiction which suggested that he must regulate his action by analogy to judicial rules. The respondent was not therefore amenable to a mandate in the nature of certiorari in respect of his action under reg. 62.

Abdul Thassim v. *Edmund Rodrigo (Controller of Textiles)*, 48 C. N. L. R. 121, disapproved on this point.

Rex v. *Electricity Commissioners* [1924] 1 K. B. 171, 205, and *Rex* v. *Legislative Committee of the Church Assembly* [1928] 1 K. B. 411, 415, referred to.

Order of the Supreme Court of Ceylon affirmed.

APPEAL (No. 17 of 1949) from an order of the Supreme Court of Ceylon (October 8, 1947).

On March 21, 1947, the appellant had obtained a rule nisi calling on the respondent to show cause why a mandate in the nature of a writ of certiorari (to use the language of s. 42 of the Courts Ordinance) should not issue to him with a view to quashing an order which he had made on March 10, 1947, cancelling the appellant's licence to act as a dealer in textiles. By the order of the Supreme Court, which was the subject of this appeal, the rule nisi was discharged.

By s. 42 of the Courts Ordinance (R.S. of Ceylon, 1938, c. 6): "The Supreme Court or any Judge thereof . . . shall have full "power and authority . . . to grant and issue, according to law, "mandates in the nature of writs of mandamus, quo warranto, "certiorari, procedendo, and prohibition, against any District "Judge, Commissioner, Magistrate, or other person or tribunal."

The following facts are taken from the judgment of the Judicial Committee: Since 1943 a scheme for the rationing of textiles had been in force in Ceylon. Introduced originally by regulations made by the Governor under the appropriate Defence powers, it was operated at the dates material to this appeal in accordance with the Defence (Control of Textiles) Regulations, 1945. One of the features of the scheme was that it restricted dealings in regulated textiles to such persons as held textile licences, the responsibility for granting which lay with an officer appointed by the Governor to be Controller of Textiles. In effect, therefore, a dealer who could

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not obtain, or who lost, a textile licence was out of the textile business so long as the scheme continued in operation. The appellant had secured a licence on his original application in July, 1943, the licence authorizing him to carry on business in textiles at Nos. 109 and 111, Keyzer Street, Pettah, Colombo. From that time until the revocation of his licence in March, 1947, he had carried on business at that address in partnership with Shabandri Mohamed Hussain under the style " S. Mohamed Hussain & Co.".

On March 10, 1947, the respondent, the then Controller of Textiles, sent a letter to the appellant's firm which contained the words: " I find you are a person unfit to hold a textile licence. " I therefore order the revocation of your licence under reg. 62 " with effect from March 10, 1947." The regulation thus invoked by the respondent was the last of a fascicule of regulations headed " Offences and Punishments " and ran as follows: " 62. Where " the Controller has reasonable grounds to believe that any dealer " is unfit to be allowed to continue as a dealer, the Controller may " cancel the textile licence or textile licences issued to that dealer." On that the appellant started the present proceedings. On March 21, 1947, he obtained from the Supreme Court a rule nisi directed to the respondent requiring him to show cause why a writ of certiorari should not be issued to him for the purpose of quashing his order of cancellation. The petition on which the rule nisi was obtained showed that the respondent's decision to cancel the licence had been preceded by certain exchanges between the parties which arose out of the discovery of what appeared to be grave falsifications in the books of that branch of the respondent's office that was known as the Textile Coupon Bank.

The Textile Coupon Bank was an agency for collecting from dealers the coupons which they themselves had collected from their customers on the sale of textiles. Coupons paid into the bank by a dealer were credited to him in its books and, no doubt, the account so kept with him governed the volume of his future permitted textile imports. The system that was instituted for checking the record of coupons so paid in was an elaborate one. It was not necessary for the purposes of this appeal, nor were their Lordships of the Board sufficiently informed as to the whole machinery of the scheme of control, to say how many persons might stand to gain by such a falsification of the books as would credit to a dealer a larger number of coupons than he had in fact paid in. It was a falsification of that kind that the respondent claimed to have discovered with regard to the appellant's account with the bank, and on February 22, 1947, he sent to the appellant's firm a letter which, in effect, amounted to a charge that on two separate occasions, November 30, 1946, and December 21, 1946, they had paid in 669 and 992 points respectively but had got their paying-in slips altered so as to show the larger amounts of

5,669 and 2,992 points respectively, with a view to obtaining in their ledger account at the bank credit for a larger amount than the coupons actually surrendered entitled them to. The letter invited the appellant to send any explanation that he might wish to offer in respect of those matters to the respondent in writing by the 25th of the same month and stated that any relevant documents might be seen at the Control of Textile Office. It was fairly plain that that letter was not the first intimation which the appellant had received to the effect that irregularities affecting his account were being investigated in the respondent's office. On February 25, 1947, his proctors addressed to the respondent a letter of explanation, the substance of which was to maintain that on the two impugned occasions the appellant had in fact surrendered coupons covering the larger amounts of 5,669 and 2,992 points, and to assert that both the foil and counterfoil of his paying-in book, which showed those numbers in words and figures, though with obvious interpolations in respect of the thousand numeral, were documents substituted by some other person in the place of the firm's genuine foil and counterfoil. After considering that explanation in the light of the other information that was before him the respondent formed the view that he had reasonable grounds to believe that the appellant was unfit to be allowed to continue as a dealer in textiles and accordingly exercised his powers under reg. 62 and cancelled the licence.

In due course the respondent appeared before the Supreme Court to show cause why the rule nisi for the writ of certiorari should not be made absolute, and on October 8, 1947, Canekeratne J. delivered judgment to the effect that the rule nisi must be discharged with costs.

1950. May 1, 2, 3. *Stephen Chapman* for the appellant. Three main questions arise on the appeal. First, is the respondent amenable at all to certiorari?—that, in substance, is raised by the respondent's case. So far as the appellant is concerned there is a judgment of the Supreme Court of Ceylon holding that the Textiles Controller is amenable to certiorari: *Abdul Thassim* v. *Edmund Rodrigo* (*Controller of Textiles*) (1). Secondly, assuming that the respondent is amenable to certiorari, in the circumstances of this case were the conditions fulfilled for the exercise of this power? It is submitted that there must in fact be reasonable grounds for the exercise of the power, and that if, on inquiry, it is found that there were no grounds at all, and it is contended that there were none here, it goes to his jurisdiction to exercise his power. Thirdly, and again on the assumption that the respondent is amenable to certiorari, and assuming also that the appellant is wrong on the second point, did the Controller comply with the requirements of natural justice?

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(1) (1947) 48 C. N. L. R. 121.

By its language reg. 62 is intended to be concerned with something purely personal to the individual dealer; it is unfitness on his part. There is therefore no scope for importing into reg. 62 that unfitness by virtue of being responsible in certain proceedings for the acts of his servants. The only charge made against the appellant was not that he did it, but that he got it done. The substance of the matter must be that someone in the Textile Coupon Bank must have been perpetrating forgeries. The appellant is alleged to have been aiding and abetting the forgeries, and that is the sole ground on which the Controller has said that the appellant is not a fit person to have a textile licence. On the natural justice aspect of the case, before the Supreme Court, the Controller put in affidavits from his officials in the Coupon Bank. There was no suggestion that at any inquiry or at any previous stage the appellant was told what those officials had to say, and certainly he had no opportunity of cross-examining them. There is no indication at all as to what the case against him was until the order had been made and the matter came up before the Supreme Court, and then for the first time the affidavits appeared, and two most significant officials in the whole proceedings, the ledger clerk and the chief clerk, did not give evidence. Further, at about the same time as this case three other dealers had been taxed with a similar charge by the Controller on substantially identical facts, and in each of those cases the Supreme Court made a mandate in the nature of certiorari and quashed the Controller's order. It is submitted that those cases should be binding in the present case. What is natural justice must depend on the subject-matter of the particular inquiry. Where the matter of inquiry is something which is essentially of a criminal character—where the only charge which the Controller is making is a criminal charge—then natural justice requires that he should examine the matter in the same way as any court exercising criminal jurisdiction does, and he should give the benefit of any reasonable doubt to the person against whom the charge is made.

Turning to the first point of law—whether the respondent is amenable to certiorari—it is submitted that it was rightly held in *Abdul Thassim's* case (2) that the Controller is a " person " within the meaning of s. 42 of the Courts Ordinance and is amenable to certiorari. The next point, the question as to jurisdiction, involves a short consideration of *Liversidge* v. *Sir John Anderson* (3). On the construction of reg. 62, " where the Controller has reasonable " grounds to believe " makes it plain that he can only act under that regulation if there are in fact reasonable grounds. In other words, the existence of reasonable grounds for his opinion goes to the root of his jurisdiction under the regulation. He must act on the basis of reasonable grounds; they must be known to him. The principle applicable to a case like the present is to be found in the dissenting judgment of Lord Atkin in *Liversidge's* case (3), which is accepted generally as a correct statement and expresses in its present form the strict common law doctrine as to reasonable cause which had been laid down in a large number of cases. The action of the Controller is impugned on the lack of jurisdiction.

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(2) 48 C. N. L. R. 121.

(3) [1942] A. C. 206, 225.

There are a number of decisions on the natural justice point: *Board of Education* v. *Rice* (4); *Local Government Board* v. *Arlidge* (5); *Errington* v. *Minister of Health* (6); *Rex* v. *City of Westminster Assessment Committee; Ex parte Grosvenor House (Park Lane), Ld.* (7); *Rex* v. *Architects' Registration Tribunal; Ex parte Jaggar* (8). Whenever an administrative officer has a question to determine which necessarily involves in its nature the exercise of judicial functions then he is acting in a judicial capacity, and particularly where it is a question of determining whether certain charges are properly to be regarded as established against the person. In the present case a very considerable mass of material was not disclosed, and the appellant had no real opportunity of answering statements which were damning to him. There are no reasonable grounds on the evidence on which anybody could come to the conclusion that the appellant had conspired with someone in the Coupon Bank to perpetrate a fraud. He was not given an adequate opportunity to meet the allegation, and the evidence was consistent with somebody in the Coupon Bank being solely responsible.

Sir David Maxwell Fyfe K.C. and *J. G. Le Quesne* for the respondent. Certiorari does not lie to the Controller. The first argument is that under reg. 62 the respondent acts in an administrative capacity. The distinction between regs. 58 and 58A and 62 should be observed. Regulation 62 is clearly intended to be much wider in scope, and to cover such matters as fraud, forgery and bad reputation. The proper inference to be drawn is that the gravity of the matters with which reg. 62 is intended to deal means that the respondent would have to take immediate action, and it is for that reason that those responsible for the legislation gave to the Controller a wide discretion to cancel a licence as an administrative act.

The second argument is that the Controller is not a " person " to whom s. 42 of the Courts Ordinance applies. He is not a

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(3) [1942] A. C. 206.
(4) [1911] A. C. 179, 182.
(5) [1915] A. C. 120, 132–3.
(6) [1935] 1 K. B. 249, 264, 272, 280.
(7) [1941] 1 K. B. 53, 67–8.
(8) [1945] 2 All E. R. 131, 138.

"District Judge, Commissioner, Magistrate, or other person or "tribunal". Those words must be read ejusdem generis, and the genus is really "tribunal" or "court". To adopt that construction would, of course, necessitate overruling *Abdul Thassim's* case (9). [On the ejusdem generis point the following Ceylon authorities were referred to: *Application for a Writ of Prohibition* (10); *Dankoluwa Estates Co., Ld.* v. *The Tea Controller* (11); *De Silva* v. *De Silva* (12) and *Wijesekara* v. *Assistant Government Agent, Matara* (13).] A tribunal clothed with the attributes of a court might consist of one person, and he might not be a magistrate, and to cover that "person" would be a reasonable word to put into the section.

The argument on the words "according to law" in s. 42, is that one has to go to the English law to see the nature of the writ and the circumstances in which it would issue, but one has to look to s. 42 to see to whom it would issue. [Reference was made to *Goonesinha* v. *O. L. De Kretser* (14).] It was alleged that these writs do not all apply to courts; there is no doubt about mandamus, certiorari and procedendo, so only quo warranto is in question, but it, too, can issue to a court: *Reg.* v. *Parham* (15); *Reg.* v. *Grimshaw* (16); *Moulvi Hamid Hassan Nomani* v. *Banwarilal Roy* (17). It is conceded that mandamus and quo warranto can issue to administrative officers. It was next said that the Controller was acting in a judicial capacity. Regulation 62 does not compel the hearing of evidence or the formulating of an opposition before action can be taken. The regulations compel the view that reg. 62 is administrative. For the difference between administrative and judicial proceedings see *Rex* v. *London County Council; Ex parte The Entertainments Protection Association* (18); *Patterson* v. *District Commissioner of Accra* (19) and *Howell* v. *Addison* (20).

The next question is whether the *Liversidge* v. *Anderson* (21) principle applies. If certiorari does lie to the Controller then the only question of jurisdiction into which the courts can inquire is the honesty of his opinion that he has reasonable grounds to believe. The Controller comes into the category of persons who should be allowed a subjective test; that test should be whether he honestly believes, or honestly is of opinion, that he had reasonable grounds to believe. It is a matter for the subjective test, first, because these are Defence Regulations; secondly, because

(9) 48 C. N. L. R. 121.
(10) (1915) 18 C. N. L. R. 334.
(11) (1941) 42 C. N. L. R. 197, 206.
(12) (1941) 42 C. N. L. R. 531, 535.
(13) (1943) 44 C. N. L. R. 533.
(14) (1944) 46 C. N. L. R. 107, 109.
(15) (1849) 13 Q. B. 858.
(16) (1847) 10 Q. B. 747.
(17) (1947) L. R. 74 I. A. 120, 125.
(18) [1931] 2 K. B. 215, 233.
(19) [1948] A. C. 341, 348.
(20) [1943] 1 All E. R. 29, 32.
(21) [1942] A. C. 206.

the Controller is given such wide power; and thirdly, because it is difficult to imagine that the regulations deliberately omitted the appeal procedure.

The last matter is that if certiorari does lie to the Controller, and if the questions of jurisdiction into which the courts can inquire include the objective test whether the respondent had in fact reasonable grounds to believe, then the court is entitled to consider two points: first, did there exist grounds known to the Controller on which a reasonable man might have come to the conclusion that the appellant was unfit to hold a licence? It is submitted that objective grounds did exist and that the Controller was entitled to take the view which he did. Secondly, in investigating the existence of these grounds and in forming his opinion did the Controller apply the rules of natural justice? It is submitted that the court cannot inquire whether the respondent has come to the right conclusion on facts in dispute. Even if the facts were not in dispute, but there were two possible inferences of fact, the court could not interfere to say that the respondent had drawn the wrong inference: *Rex* v. *Ludlow; Ex parte Barnsley Corporation* (22).

Lastly, the Controller did not act contrary to the rules of natural justice. Natural justice is dealt with in *Maclean* v. *The Workers' Union* (23). There are two essential principles, (*a*) that the person affected must be told the nature of the allegation against him, and (*b*) he must be given an opportunity to answer it. It is impossible to say that the respondent did not tell the appellant what the allegations against him were, and gave him the fullest opportunity of answering them.

Stephen Chapman in reply. It was intended to give to the Supreme Court in Ceylon the same jurisdiction as regards the prerogative writs as the Court of King's Bench in this country. There is every reason for giving the words of s. 42 of the Courts Ordinance a wide interpretation. The Controller in having this jurisdiction was to exercise it judicially, and was to be challengeable if he failed to do so.

June 29. The judgment of their Lordships was delivered by LORD RADCLIFFE. The material facts of the case, though few in number, are somewhat obscure, and it is difficult by a study of them to arrive at any certain conclusion as to what really happened. But, apart from the merits of the individual case, the respondent's counsel raised several important questions during the argument of the appeal which relate to the jurisdiction conferred on the Supreme Court by s. 42 of the Courts

(22) [1947] K. B. 634, 640.

(23) [1929] 1 Ch. 602, 625.

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Ordinance and to the power of that court to issue any writ of certiorari to him in respect of his cancellation of a textile licence under the relevant section of the Defence (Control of Textiles) Regulations, 1945. It is desirable to deal with these questions, which are general, before coming to the individual merits of the present appellant's application for the court's mandate; and in view of the opinion which their Lordships entertain as to the respondent's immunity it will not be necessary to consider at any great length the details of the incident that led to the cancellation. But a short statement of the facts will serve to explain the issue as to the court's jurisdiction. [His Lordship then stated the facts set out above and continued:] The ground of Canekeratne J.'s decision was that on the facts of the case as they appeared in the evidence before him the appellant had not shown himself entitled to the mandate that he sought, because the respondent, though exercising a quasi-judicial function in deciding to cancel a licence under reg. 62, had not departed in any way from the rules of natural justice in the procedure by which he arrived at his decision. The learned judge therefore applied to this case the principle of a familiar line of English authorities of which *Board of Education* v. *Rice* (24) and *Local Government Board* v. *Arlidge* (25) are the leading examples. Having regard to the decision of a Bench of five judges (Howard C.J., Keuneman, Wijeyewardene, Canekeratne JJ., and Nagalingam A.J.) in *Abdul Thassim* v. *Edmund Rodrigo* (*Controller of Textiles*) (26), it was not open to the learned judge in the Supreme Court to consider either the question whether s. 42 of the Courts Ordinance gave the court power to direct the prerogative writs to a person such as the Controller of Textiles or the question whether a Controller of Textiles acting under the powers of reg. 62 is acting in a capacity that would make him amenable to certiorari, even supposing that he is a person or tribunal within the meaning of s. 42. Both these questions were, however, fully argued before their Lordships, and they must therefore consider them. In effect, this means that they must review the Supreme Court's decision in the *Abdul Thassim* case (26).

There is nothing in the Roman-Dutch law or the law of Ceylon that corresponds to the "writs of mandamus, quo warranto, "certiorari, procedendo and prohibition". It seems obvious, therefore, that the jurisdiction of the Supreme Court to grant and issue mandates in the nature of such writs is derived exclusively from s. 42 and was conferred originally on that court by the legislative predecessor of that section. The range of the jurisdiction must be found within the words of the statutory grant. Those words describe the permissible subjects of the court's

(24) [1911] A. C. 179.

(25) [1915] A. C. 120.

(26) 48 C. N. L. R. 121.

mandates as being "any District Judge, Commissioner, Magis-"trate, or other person or tribunal". The respondent contends that he is not an "other person or tribunal" within the meaning of those words, since their collocation with the words "District "Judge, Commissioner, Magistrate" indicates that they extend only to tribunals (or persons acting as tribunals) which are in the ordinary sense established judicial bodies; and he reinforces his argument by pointing out that s. 42 confers a number of powers in series, the power in question being preceded by a power to inspect and examine the records of any courts and being succeeded by a power to transfer cases from one court to another. Hence, he argues, the range of persons or tribunals that are subject to the court's mandate under s. 42 is more limited than that which is encompassed by the common law of England, and is confined to persons who are ejusdem generis with District Judges, Magistrates or Commissioners.

Their Lordships agree with the decision of the Full Bench on this point. It is not necessary to add to their reasons. The reference to the writs of mandamus and quo warranto certainly makes it difficult to suppose that only courts of justice as ordinarily understood are to be subject to these mandates. Moreover, there can be no alternative to the view that when s. 42 gives power to issue these mandates "according to law" it is the relevant rules of English common law that must be resorted to in order to ascertain in what circumstances and under what conditions the court may be moved for the issue of a prerogative writ. These rules, then, must themselves guide the practice of the Supreme Court in Ceylon. But even in the cases of certiorari and prohibition the English law does not recognize any distinction for this purpose between the regularly constituted judicial tribunals and bodies which, while not existing primarily for the discharge of judicial functions, yet have to act analogously to a judge in respect of certain of their duties. The writ of certiorari has been issued to the latter since such ancient times that the power to do so has long been an integral part of the court's jurisdiction. In truth, the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted. If these rules are borne in mind with respect to the phrase "according to law", the limited construction of s. 42 for which the respondent contends is not only one which it is very difficult to express in precise words but one which is based on an altogether different conception from that which has guided the development of the English practice.

If, then, the Controller of Textiles is not excluded from the ambit of s. 42 on the proper construction of the words " other " person or tribunal ", would it be " according to law " that he should be amenable to certiorari when he purports to act under reg. 62; assuming, of course, for this purpose that in acting he has made a decision that is liable to be quashed on its merits? The Supreme Court held in the *Abdul Thassim* case (27) that he was so amenable, and that decision has been given effect to in three other cases the facts of which bear a substantial similarity to the facts of that now under appeal. One of them, *Jayaratne* v. *Bapu Miya Mohamed Miya* (28), is also the subject of appeal to this Board. The foundation of the Supreme Court's reasoning on this point is to be found in one sentence of the judgment of Howard C.J. in the *Abdul Thassim* case: " The fact that he can " only act when he has ' reasonable grounds ' indicates that he " is acting judicially and not exercising merely administrative " functions ".

It would be impossible to consider the significance of such words as " Where the Controller has reasonable grounds to " believe . . ." without taking account of the decision of the House of Lords in *Liversidge* v. *Sir John Anderson* (29). That decision related to a claim for damages for false imprisonment, the imprisonment having been brought about by an order made by the Home Secretary under the Defence (General) Regulations, 1939, reg. 18B, of the United Kingdom. It was not a case that had any direct bearing on the court's power to issue a writ of certiorari to the Home Secretary in respect of action taken under that regulation: but it did directly involve a question as to the meaning of the words " If the Secretary of State has reason- " able cause to believe any person to be of hostile origin or " associations . . ." which appeared at the opening of the regulation in question. And the decision of the majority of the House did lay down that those words in that context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appears to be the only possible judge of the conditions of his own jurisdiction.

Their Lordships do not adopt a similar construction of the words in reg. 62 which are now before them. Indeed, it would be a very unfortunate thing if the decision of *Liversidge's* case (29) came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words " if A.B. has reasonable cause to believe " are capable of meaning

(27) 48 C. N. L. R. 121.
(28) P. C. App., No. 18 of 1949.
(29) [1942] A. C. 206.

"if A.B. honestly thinks that he has reasonable cause to believe" and that in the context and attendant circumstances of Defence Regulation 18B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning "if there is in fact reasonable cause "for A.B. so to believe" After all, words such as these are commonly found when a legislature or law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. Their Lordships therefore treat the words in reg. 62, "where the Controller has reasonable "grounds to believe that any dealer is unfit to be allowed to con- "tinue as a dealer" as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation.

But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari.

Their Lordships have come to the conclusion that certiorari does not lie in this case. It would not be helpful to reconsider the immense range of reported cases in which certiorari has been granted by the English courts: or the reported cases, themselves numerous, in which it has been held to be unavailable as a remedy. It is, of course, a commonplace that its subjects are not confined to established courts of justice, and instances may be found of the quashing of orders or decisions in which the occasion of their making seems only distantly related to a judicial act. It is probably true to say that the courts have been readier to issue the writ of certiorari to established bodies whose function is primarily judicial, even in respect of acts that approximate to what is purely administrative, than to ministers or officials whose function is primarily administrative even in respect of acts that have some analogy to the judicial. But the basis of the jurisdiction of the courts by way of certiorari has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute. That principle is most precisely stated in the words of Atkin L.J. (as he then was) in *Rex* v. *Electricity Commissioners* (30): " . . . the operation of the writs has extended " to control the proceedings of bodies who do not claim to be, " and would not be recognised as, courts of justice. Wherever " any body of persons having legal authority to determine ques" tions affecting the rights of subjects, and having the duty to " act judicially, act in excess of their legal authority they are " subject to the controlling jurisdiction of the King's Bench " Division exercised in these writs ". As was said by Lord Hewart C.J., in *Rex* v. *Legislative Committee of the Church Assembly* (31) when quoting this passage, " In order that a " body may satisfy the required test it is not enough that it " should have legal authority to determine questions affecting the " rights of subjects; there must be super-added to that charac" teristic the further characteristic that the body has the duty to " act judicially."

It is that characteristic that the Controller lacks in acting under reg. 62. In truth, when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it. But, that apart, no procedure is laid down by the regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts. The licence holder has no right to appeal to the Controller or from the Controller. In brief, the power conferred on the Controller by reg. 62 stands by itself on the bare words of the regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing

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(30) [1924] 1 K. B. 171, 205.

(31) [1928] 1 K. B. 411, 415.

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else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules.

For these reasons their Lordships are of opinion that the case of *Abdul Thassim* (32) was wrongly decided on this point, and that the respondent's argument that he is not amenable to a mandate in the nature of certiorari in respect of action under reg. 62 must prevail. That in itself is sufficient to dispose of the appeal. But since the merits of the appellant's case have been fully argued before them and a question of costs might arise if the appeal were to be dismissed merely on this point of jurisdiction that could not have been argued in Ceylon, their Lordships will indicate the view that they would have taken had certiorari been an available remedy in this case.

They have no doubt that Canekeratne J. was right in discharging the rule nisi. The situation that was revealed to the court by the respondent's evidence was this. Dealers who wished to pay in textile coupons into the Coupon Bank were provided by the bank with a paying-in book, the slips of which consisted of foil and counterfoil. The dealer entered on foil and counterfoil the number of coupons to be surrendered and took or sent the book and coupons to the bank. They were there handed to a receiving clerk who counted the coupons, checked the number so counted against the numbers entered in the foil and counterfoil of the paying-in slip and recorded that number in a scroll-book which the dealer or his representative thereupon signed. That was the first check. The respondent produced affidavits from the two receiving clerks who had been on duty on November 30 and December 21, 1946, respectively, to the effect that they had entered in the scroll-book the numbers of 669 and 992 in respect of the coupons surrendered on behalf of the appellant on those days, and that the appellant's servant, M. O. Aliyar, had initialled the scroll-book bearing those numbers. They also identified their initials on the counterfoils of the paying-in slips. The second check was that the receiving clerk handed the dealer's paying-in book and the coupons to an assistant Shroff, who recounted the coupons, compared their number with the numbers entered in the foil and counterfoil and initialled both. The respondent produced an affidavit from this official stating that he had counted the coupons surrendered, and identifying his initials on the foil and counterfoil of the paying-in slips. The assistant Shroff then passed the paying-in book to the Shroff. The Shroff compared the particulars on the foil with those on the counterfoil to see that they tallied and, if satisfied, entered the particulars in a register kept by him. He then affixed serial numbers to foil and counterfoil, initialled the counterfoil, signed the foil and passed on both these documents to the chief clerk. This was the third check. The respondent produced affidavits from the Shroff (for November 30, 1946), and the official who had acted as Shroff (for December 21, 1946), identifying their respective signatures and initials on the relevant foils and counterfoils and confirming that they had entered in the Shroff's register the respective numbers of 669 and 992 in respect of the coupons surrendered by the appellant. Up to this point, therefore, there was a complete chain of evidence to the effect that the appellant had only surrendered these numbers of 669 and 992 coupons on those days. Now, as has been said, the next step in the Coupon Bank system was that the Shroff passed on the paying-in book to the chief clerk. His duty was to countersign foil and counterfoil and to record in a register kept by him, called the credit control book, the number of coupons appearing in those documents. He then retained the foil of the paying-in slip but returned to the dealer the paying-in book with the counterfoil. The foil was in turn passed on to a ledger clerk who entered up the number of coupons shown on it to the credit of the dealer. No evidence was forthcoming on the part of any chief clerk or ledger clerk, but the respondent's own affidavit showed that, whereas the chief clerk's register recorded 669 and 992 coupons as surrendered by the appellant on the relevant dates, the ledger account credited him with the larger numbers of 5,669 and 2,992 respectively.

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(32) 48 C. N. L. R. 121.

Plainly, therefore, the respondent had before him serious discrepancies in the books of his own office, the final result of which was to credit the appellant with a much larger number of surrendered coupons than the records of the receiving clerks and their checkers appeared to justify. Moreover, the two foils in the possession of the department showed, if they showed nothing more, that the words and figures denoting five thousand and two thousand respectively had been inserted at a different time from that at which the words and figures denoting the rest of the total had been written. It is not possible to tell exactly from the evidence before the court what was the sequence of the respondent's actions. An inspector of his department obtained the counterfoils from the appellant's possession: these showed the same interpolations as the foils had shown. The counterfoils were submitted to the government analyst, who reported that the slip dated November 30, 1946, bore signs of an erasure on which the words "Five thousand" had been written, and that in the total the first figure "5" in fact overlay the figure "6" that followed. He found no definite indications on the other counterfoil. On February 22 the respondent wrote the appellant the letter already referred to, in which he informed him precisely what were the discrepancies in his account that were being investigated, stated that the foils and counterfoils of the paying-in

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slips showed interpolations covering the bigger amounts, and told him that he (the respondent) had reason to believe that the appellant had got the interpolations made with a view to securing for himself a larger credit than he was properly entitled to. An explanation in writing was invited and the appellant was told that he could inspect any relevant documents.

On February 25 the appellant's proctors sent a written explanation. The gist of it was that he had in fact surrendered the larger number of coupons on both the challenged dates. The paying-in slips had been entered up in the handwriting of the appellant and there were no interpolations on them when he sent them with the coupons to the bank. They had been taken to the bank by the servant, M. O. Aliyar, whose regular practice it was to put his own signature on paying-in slips. The letter then put forward the suggestion that the true paying-in slips had been destroyed by someone and that those now existing and bearing interpolations (the counterfoils of which had in fact been recovered from the appellant's possession) had been substituted in a handwriting which was not that of the appellant or any of his employees. No direct allusion was made to the fact that Aliyar's signature was, presumably, in the scroll-book acknowledging the lower amounts as paid in; but the letter stated that in the past Aliyar sometimes put his signature in the book without verifying the entry, and that on other occasions he put his signature to a blank space that was later filled in. Either of these things, it was suggested, might have happened on the two challenged occasions.

Apart from sending this letter the appellant seems to have procured an interview for his counsel with the respondent, at which submissions were made. What they were the evidence did not reveal. Finally, the respondent's affidavit speaks of an inquiry which he deputed an Assistant Controller to hold and of statements recorded at that inquiry or directly by himself on the part of the appellant, his partner S. Mohamed Hussain, and the employee Aliyar. Again the evidence fails to explain at what stage these statements were made or what their content was, and it is significant that the appellant's evidence makes no reference to them either by way of affirmation or denial. When all this procedure had been completed the respondent cancelled the appellant's licence.

It is impossible to see in this any departure from natural justice. The respondent had before him ample material that would warrant a belief that the appellant had been instrumental in getting the interpolations made and securing for himself a larger credit at the bank than he was entitled to. Nor did the procedure adopted fail to give the appellant the essentials that justice would require, assuming the respondent to have been under a duty to act judicially. The appellant was informed in precise terms what it was that he was suspected of: and he was given a proper opportunity of dissipating the suspicion and having such representations as might aid him put forward by counsel on his behalf. In fact, the explanation that he did offer was hardly calculated to allay the respondent's suspicions: probably it confirmed them. It left unanswered so many questions to which the appellant could have supplied some solution if he had really been innocent of any complicity in the falsifications. If he had surrendered the number of coupons credited to him in his ledger account, as he maintained, he must have had books or records of his own which verified his possession of those numbers on the relevant dates. He never produced such books or records. If he had somehow become possessed of substituted counterfoils, not, as they should have been, in his handwriting, he must have been able to offer some explanation as to how this came about and how the difference was not detected. He gave no explanation. If Aliyar's signature was in the scroll-book against the smaller numbers of coupons surrendered, it was no good suggesting that Aliyar might not have verified the numbers on those occasions or might have signed in blank. Either the appellant should have found out and explained what Aliyar's account of these matters was or else, if Aliyar was no longer in his employ and available to be questioned, he should have stated unequivocally that this was so. But, failing explanations from him on points such as these, a heavy cloud of suspicion remained; and, if the respondent felt bound to act on this suspicion, it was not because he had come to entertain it through any denial of natural justice or without reasonable cause, but because the appellant himself either could not, or would not, produce the explanation that would have dissolved it.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Solicitors: *Darley, Cumberland & Co.; Burchells.*

[PRIVY COUNCIL]

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July 26.

SINNASAMY SELVANAYAGAM . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON

Ceylon—Criminal law—Criminal trespass—Proof of real or dominant intent—Penal Code (Legislative Enactments of Ceylon, 1938, *c.* 15), *s.* 427.

By s. 427 of the Ceylon Penal Code: " Whoever enters into or "upon property in the occupation of another with intent to commit an offence, or to intimidate, insult, or annoy any person in "occupation of such property, or having lawfully entered into or "upon such property unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with "intent to commit an offence, is said to commit 'criminal "'trespass' ".

Entry upon land, made under a bona fide claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent, or, at any rate, constituted no more than a subsidiary intent.

Contrary view in *Suppaiya* v. *Ponniah* (1909) 14 C. N. L. R. 475, disapproved.

Wijeymanne v. *Kandiah* (1933) 35 C. N. L. R. 244, approved.

Forbes v. *Rengasamy* (1940) 41 C. N. L. R. 294, distinguished.

Judgment of the Supreme Court of Ceylon (1946) 47 C. N. L. R. 337, reversed, and conviction and sentence set aside.

APPEAL (No. 38 of 1947), by special leave, from a judgment of the Supreme Court of Ceylon (August 30, 1946) which dismissed the appellant's appeal against his conviction in the Magistrate's Court of Kegalla (June 27, 1946) on a charge of criminal trespass punishable under s. 433 of the Ceylon Penal Code.

The following facts are taken from the judgment of the

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* *Present*: LORD NORMAND, LORD OAKSEY, LORD REID, SIR JOHN BEAUMONT and the Chief Justice of Canada (THE RT. HON. T. RINFRET).

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Judicial Committee:—On April 23, 1945, the Government of Ceylon duly gave notice of its intention to take possession of certain private lands, including the Knavesmire estate, for village expansion pursuant to the Land Acquisition Ordinance (Legislative Enactments of Ceylon, 1938, c. 203). On November 26, 1945, the executive committee of the local administration directed the land officer of Knavesmire to take possession of the estate for and on behalf of His Majesty pursuant to s. 12 of the Ordinance, and on December 6, 1945, the land officer certified that he had that day taken possession of the estate on behalf of His Majesty. It was not disputed that thereupon the estate vested absolutely in His Majesty free from all encumbrances.

The Government continued for the time being to employ the labour force then on the estate, the appellant being a member of that force. On January 30, 1946, D. R. M. Rajapakse was appointed by the Governor to the post of superintendent of the Knavesmire estate, the terms of appointment being stated in a letter dated June 26, 1946, addressed to him by the Chief Secretary (Exh. P.9). According to the evidence of one, Henderson, assistant government agent of Kegalla, given at the hearing of this matter, the appointment was made on his recommendation.

The object of the Government in acquiring the Knavesmire estate was to place in possession of it selected landless residents from certain villages who would work the estate on co-operative lines. According to the evidence of Henderson, he selected 243 such tenants, and with a view to providing them with work on the estate he instructed Rajapakse, the superintendent, to give notice to all the labourers on the estate as from the end of May, 1946. In accordance with those instructions Rajapakse, on April 29, 1946, gave notice to the appellant (Exh. D.1) terminating his employment as from May 31, 1946, and directing him to hand over to Rajapakse the house which he occupied and to leave the estate on or before May 31, 1946. On that date the appellant accepted his wages, but refused to accept a discharge ticket tendered to him, and declined to leave the premises in his occupation.

According to the evidence of the appellant given at the hearing, when the estate was taken over by the Crown he and his wife and mother occupied two rooms in the lines on the estate His father and grandfather had occupied the rooms before him. His father had planted trees in the garden plots in front and in rear of the rooms and the appellant and his parents had enjoyed the produce of the trees. The appellant claimed that he and his ancestors had been in occupation of the rooms for seventy years and for that reason he declined to quit, since he had no other house to live in. He claimed the right to stay on the estate since for generations he and his family had lived there.

On June 5, Henderson, the assistant government agent, made a report to the Magistrate's Court of Kegalla that the appellant had committed criminal trespass by unlawfully continuing to remain on the Knavesmire estate, property of the Crown in the occupation of D. R. M. Rajapakse, superintendent of the said estate, with intent thereby to annoy Rajapakse, and thereby committed an offence punishable under s. 433 of the Penal Code, and on the same day a summons was issued to the appellant to answer to the complaint.

At the trial the magistrate found that Rajapakse was at the material time in actual and physical occupation of the whole of the Knavesmire estate and all the buildings thereon; that the appellant had occupied two line rooms not as a tenant but as a servant, and that when his employment ended by notice to quit duly served on him his subsequent remaining on the estate was unlawful; and that the facts proved warranted the conclusion that the intention of the accused by remaining on the estate was to cause annoyance to Rajapakse, since that would be the natural consequence of his action. The appellant was accordingly, on June 28, 1946, convicted and sentenced to two months' rigorous imprisonment.

An appeal against the conviction was lodged in the Supreme Court and was heard on August 30, 1946, by Jayetileke J., who agreed with the conclusions of the magistrate and dismissed the appeal.

1950. June 26, 29. *Casswell K.C.*, *Millner* and *R. K. Hermone* for the appellant.

Sir David Maxwell Fyfe K.C., *Gahan* and *Le Quesne* for the respondent.

July 26. The judgment of their Lordships was delivered by SIR JOHN BEAUMONT, who stated the facts set out above and continued:—To establish the criminal trespass charged the Crown must show: (1) that the occupation by the appellant of his two rooms after the expiration on May 31, 1946, of the notice to quit was unlawful; (2) that Rajapakse was at the date of the expiration of the notice to quit in occupation of the Knavesmire estate, including the rooms in which the appellant and his family lived; and (3) that the intention of the appellant in refusing to surrender his two rooms was to annoy Rajapakse, there being no suggestion of an intention ~~to~~ commit an offence or to intimidate or insult.

The evidence on record does not establish clearly the nature of the appellant's occupation of his two rooms, since there is no evidence as to the origin of that occupation, but their Lordships are in agreement with the view expressed by Jayetileke J. in the Supreme Court that the effect of acquisition by the Crown of the

Knavesmire estate under the Land Acquisition Ordinance, assuming the proceedings under the Ordinance to have been in order, was to wipe out any interest which the appellant may have had in any part of the estate. Their Lordships will therefore assume that the occupation of the appellant was unlawful after May 31, 1946, and they will determine on that basis the two remaining questions: whether Rajapakse was in occupation of the rooms in which the appellant lived, and, if so, whether the refusal of the appellant to give up those rooms was with intent to annoy Rajapakse.

Section 427 does not make every trespass a criminal offence: it is confined to cases in which the trespass is committed with a particular intention, and the intention specified indicates that the class of trespass to be brought within the criminal law is one calculated to cause a breach of the peace. Their Lordships are satisfied that the section was not intended to provide a cheap and expeditious method for enforcing a civil right. It is to be noted that the section deals with occupation, which is a matter of fact, and not with possession, which may be actual or constructive and may involve matters of law. The first paragraph of the section comes into operation when a trespasser enters land in the occupation of another with the intent specified, and the second paragraph applies when the entry is lawful but becomes unlawful, e.g., when the entry is made on the invitation of the occupier and there is a refusal to leave when the invitation is withdrawn. But, in either case, there must be an occupier whose occupation is interfered with, and whom it is intended to insult, intimidate or annoy (unless the intent is to commit an offence). The section has no application where the fact of occupation is constant, the only change being in its character, as where a tenant holds over after the expiration of his tenancy.

In the present case, according to the uncontradicted evidence, the only person in physical occupation of the two rooms at the material dates was the appellant, who cannot have intended to annoy himself. This difficulty the respondent sought to overcome by alleging that the occupation by the appellant of his two rooms was that of a servant and was in law, therefore, the occupation of the master; that after the acquisition of the Knavesmire estate by the Crown and the re-employment of the appellant on the estate, the occupation of the appellant became that of the Crown, and that Rajapakse represented the Crown. Their Lordships have already indicated that in their view there is no satisfactory evidence as to the character of the appellant's occupation, but assuming it to have been that of a servant, their Lordships think it clear that Rajapakse was not the master. The terms of his appointment in Exh. P.9 do not define his duties; but, as already pointed out, it was Henderson who secured his appointment;

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it was Henderson who directed Rajapakse to serve the notices to quit; and it was Henderson who selected the new tenants for the land. There is no evidence that Rajapakse had any power to dismiss the appellant, or that he was under any obligation to pay the appellant's wages, or was in any sense his master, and in their Lordships' opinion the Crown failed to prove that Rajapakse was the man in occupation of the estate, including the two rooms, at the material time. If this be so, an intention to annoy Rajapakse would be irrelevant, but in their Lordships' view the Crown also failed to prove the existence of such an intention.

It was suggested in argument that there were concurrent findings of fact as to the appellant's intention, but intention, which is a state of mind, can never be proved as a fact: it can only be inferred from facts which are proved. It may well be that in doing a particular act a man may have more intentions than one; and Sir David Maxwell Fyfe, for the respondent, did not dispute that to bring a case within s. 427 the intention specified in the section must be the dominant intention. The appellant, when in the witness box, was not asked whether he intended to annoy Rajapakse; nor were any questions put to him to suggest that he was on bad terms with Rajapakse, who was merely carrying out the orders of his superiors. The courts in Ceylon thought that an intention to annoy Rajapakse must be inferred because such annoyance would be the natural consequence of the appellant's refusal to quit, and that the appellant must have appreciated this. Their Lordships are not prepared to hold that the appellant, in refusing to give up his two rooms, thereby no doubt increasing the difficulties of the superintendent, intended to induce, or contemplated that he would induce, in the mind of the superintendent an emotion so inappropriate to a government officer, and so unprofitable, as annoyance; but even if the appellant did anticipate that Rajapakse would be annoyed, it is perfectly clear from his evidence that his dominant intention was to remain on the estate where he and his family had lived for generations and not to find himself homeless. Entry upon land, made under a bona fide claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent, or, at any rate, constituted no more than a subsidiary intent. Their Lordships are not in agreement with the contrary view which Wood Renton J. seems to have entertained in *Suppaiya* v. *Ponniah* (1). They prefer the view of Dalton A.C.J.

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(1) (1909) 11 C. N. L. R. 475.

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in *Wijeymanne* v. *Kandiah* (2). The case of *Forbes* v. *Rengasamy* (3), on which the courts in Ceylon relied, is distinguishable, because there the accused person did not give evidence as to his real intention and the court thought that his conduct had been defiant.

The appellant asked for costs against the Crown on the ground that recourse to the criminal law was entirely unwarranted. It is very rare for their Lordships to allow costs in a criminal matter, and, although they think that in this case recourse to a criminal court was not justified, the application found some support in previous decisions of the Supreme Court and was successful in two courts. In the circumstances, their Lordships will adhere to their usual practice and make no order as to costs.

For the above reasons their Lordships will humbly advise His Majesty that this appeal be allowed and the conviction and sentence on the accused passed by the magistrate of Kegalla on June 28, 1946, be set aside.

Solicitors: *Hy. S. L. Polak & Co.; Burchells.*

(2) (1933) 35 C. N. L. R. 244. (3) (1940) 41 C. N. L. R. 294.

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May 22, 23, 24; *July* 10.

CAMINER AND ANOTHER . . . . . APPELLANTS;

AND

NORTHERN & LONDON INVESTMENT TRUST, LIMITED . . . . . RESPONDENTS.

Negligence—Nuisance—Highway—Fall of elm tree—Injury to user of highway—Duty of occupier of land—Liability.

An elm tree standing on land adjoining a busy London highway fell, injuring persons passing along the thoroughfare. The tree was about 130 years old and carried a large, but not abnormal crown. The occupiers of the land had never lopped, topped or pollarded the tree. After its fall its roots were found to be affected by a disease known as elm butt rot, which was of long standing but would have been undiscoverable by any reasonable examination. There was evidence that elms are treacherous and shallow-rooted and liable to fall suddenly. The persons injured having brought an action against the occupiers for negligence or nuisance, Lord Goddard C.J.

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* *Present*: LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD REID and LORD RADCLIFFE.

awarded them damages. He found that the fall of the tree was due to a combination of circumstances, viz., the non-lopping of the branches, the action of the wind in the crown and the rot in the roots. The Court of Appeal having allowed the occupiers' appeal, the injured persons appealed to the House of Lords.

Held, that, inasmuch as the tree was apparently sound and healthy and the evidence did not establish that inspection by an expert would have revealed that it was dangerous, the occupiers were not liable in either negligence or nuisance.

Decision of the Court of Appeal, [1949] 2 K. B. 64, affirmed.

APPEAL from the Court of Appeal (Tucker, Asquith and Singleton L.JJ.).

The Court of Appeal, on April 12, 1949, decided that an order of Lord Goddard, C.J., dated November 26, 1948, directing that judgment should be entered in favour of the appellants Mr. and Mrs. Caminer (the plaintiffs in the action) against the respondent company (the defendants) for damages as agreed in the total sum of 1,400*l*. (namely 1,050*l*. in respect of the male plaintiff and 350*l*. in respect of the female plaintiff) together with the costs of the action to be taxed, should be reversed and judgment should be entered for the defendant company with the costs of the appeal to be taxed and in the court below. The facts are fully set out in their Lordships' opinions.

Fox-Andrews K.C. and *Rees-Davies* for the appellants (plaintiffs). Elms are notoriously treacherous and dangerous. Either the whole tree or the branches may fall suddenly. This is a matter of common knowledge and is generally recognized among landowners and country people. Being notoriously shallow rooted, these trees demand special precautions. This particular tree was adjacent to a busy thoroughfare. It was large and well into middle age and it carried a considerable crown. It had never been lopped, topped or pollarded. Having regard to all this, it was the legal duty of the defendants to take steps to deal with it earlier than they did. It should have been obvious to them that it had never been treated. Further, since it was close to a wall, they should have suspected that the roots might have been cut in the process of building, thus rendering it more dangerous by the weakening of its supports and the possibility of setting up a disease in the roots.

The test applied by the Court of Appeal is what a reasonable and prudent landowner would do. That is right, and such a landowner was, on the evidence, under a duty either to lop and top a tree of this description or to take the advice of a competent expert as to the necessary steps required for public safety. If they had done so the tree would not have fallen when it did.

A landlord must take such steps as are dictated by common knowledge, and common knowledge as to the unreliability of elms called for positive action. An elm as old as this should be lopped if it is in a position to be a danger. Lack of actual knowledge of any particular circumstance of danger is irrelevant if the matter is one of common knowledge. In such a case, or where a person applying his mind ought to know that a thing is dangerous, the defendant will be liable.

If one is in control of something which is normally dangerous one must take proper precautions. A landowner with trees bordering the highway is bound to take reasonable care. What amounts to reasonable care will vary with the circumstances. A London landowner is under a particularly stringent duty. One of the experts said in evidence that if he had seen this tree standing he would have wondered why it was not lopped. Both before and after the requisitioning of their property the defendants had ample time for attention to this tree. If they had consulted an expert they would have been advised to lop it for safety. [They referred to *Noble* v. *Harrison* (1); *Cunliffe* v. *Bankes* (2); *Brown* v. *Harrison* (3); *Vancouver General Hospital* v. *McDaniel* (4); *Weller* v. *McCormick* (5); *Lamarche* v. *Les Révérends Pères Oblats* (6); and the American Restatement of the Law: Torts (Negligence), para. 363.]

Rees-Davies following. The defendants' error was to apply the test of eyesight instead of that of the mind. The test is not what the layman's eye would see but what knowledge, actual or implied, must be imputed to a reasonable landowner. He must be under a duty of some kind. The duty is one of inspection, (a) with a view to discovering whether the tree is diseased, (b) with a view to lopping. The danger of an elm is primarily that of the whole tree or of the branches falling. Therefore there is a duty to inspect it to decide whether to lop it. This duty is distinct from the duty to ascertain whether the tree is healthy or diseased. The defendants' duty of inspection was a duty to take advice.

Beney K.C. and *R. M. Everett* for the respondent company (the defendants). The tree was diseased in a serious degree and that disease was undetectable by ordinary methods. It was the presence of the disease that brought it down. That was an essential element, and without it the tree would not have fallen. Therefore even if it had been the duty of the defendants to give it expert inspection and they failed in that duty, the plaintiffs would still not have made out their case because no inspection would have revealed the true cause of the accident, viz. the disease. *Brown* v. *Harrison* (7) and *Mackie* v. *Dumbartonshire County Council* (*Western District Committee*) (8) where there was, as Lord Dunedin said in the latter case, a " patent danger " were different from the present case.

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(1) [1926] 2 K. B. 332.
(2) [1945] 1 All E. R. 459.
(3) (1947) 177 L. T. 281, 282.
(4) (1934) 152 L. T. 56, 57–8.
(5) (1885) 47 N. J. L. 397.
(6) (1905) Q. R. 29 S. C. (Quebec) 138.

A reasonable landowner cannot be expected to have the knowledge of an expert though he can be assumed to know of the usual dangers arising from elm trees, such as the tendency of branches to fall, and the shallow roots. As to the wall, it was proved that the roots had not in fact been cut. If the knowledge of the usual dangers requires the owner to saw off all branches which overhang a place where persons may go or lop all elms which adjoin such a place, this requirement is notoriously ignored, as anyone travelling upon our main highways or even visiting the Backs at Cambridge or the London parks can see for himself. It is not true that every possible known risk of accident imposes a duty; the common practice of landowners must be regarded. If it had been proved that this tree was apparently top heavy and consequently unstable in high wind there might have been a duty to lop and top it, but the evidence fell short of proving that. It is irrelevant that the plaintiffs are innocent parties. There is no evidence that the defendants failed in carrying out any duty towards them.

Fox-Andrews K.C. in reply. Whatever knowledge is to be imputed to the defendants must be imputed to the skilled estate agents whom they employed to manage the property. An employer must be deemed to have the extra knowledge of the person he is employing. " Common knowledge " does not mean that it is universal any more than " common sense ", but all persons living under our system of law must be taken to have acted in accordance with them. In evidence elms were said to be notoriously dangerous. That did not mean that the fact was known to every thinking person: it meant that, generally speaking, people knew it. Nothing less than common knowledge can be imputed to the defendants and the persons they employed. The extent of any duty is always a question of degree. In the country one can shoot pigeons where there is no likelihood of hitting someone with a pellet, but not in Hyde Park. The duty of a driver on the highway must vary with the circumstances. A demolition worker in the Temple is less likely to hit someone if he knocks bricks into a ruined basement than if he knocks them into Middle Temple Lane. [He referred to *Barkway* v. *South Wales Transport Co., Ld.* (9).]

Their Lordships took time for consideration.

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(7) 177 L. T. 281.

(8) 1927 S. C. (H. L.) 99, 102.

(9) [1950] W. N. 95; 66 T. L. R. (Pt. 1) 597, 601, 602, 605.

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July 10. LORD PORTER. My Lords, this case was tried by the Lord Chief Justice sitting without a jury and resulted in a finding for the two plaintiffs, Mr. and Mrs. Caminer (the appellants), for damages amounting to a total sum of 1,400*l*. The Court of Appeal, however, unanimously reversed his judgment though Asquith L.J. apparently entertained some doubt, and your Lordships have now to determine which of these two views should prevail.

The facts can be shortly stated. On April 7, 1947, at about 12.50 p.m., the appellants were travelling along Prince Albert Road, St. John's Wood, in a motor car, owned and driven by the first appellant, when, as they approached the junction of Prince Albert Road and Wells Rise, an elm tree standing on land immediately adjoining the highway fell upon the appellants' motor car, wrecked the vehicle and injured both the appellants. The elm tree was growing in the forecourt of a block of flats known as St. James's Close, at the corner of Prince Albert Road and Wells Rise, of which the respondents were lessees and in occupation by their tenants. They became lessees in 1940, but in June, 1941, the premises were requisitioned by the Air Ministry who remained in occupation until April, 1946, when the premises were vacated by the Ministry and returned to the respondents.

The day was fine, there was nothing exceptional about the wind, but it was blowing in strong squally gusts from time to time. The tree was a large, well-grown elm, between 120 and 130 years old. After it fell it was found that three of its roots were badly affected by a disease known as elm butt rot. The other three roots showed signs of rot, but were not so badly affected. The disease was of long standing, and must have been present in the roots many years before the respondents took possession of the property. The roots had not been cut at the time when the tree fell and there was no indication from its condition above ground that it was affected by this disease, which had not taken a normal course in as much as the fungus which caused it was working out sideways along the main roots and had not affected the trunk. There was nothing, therefore, to indicate by external examination that the tree was in any way diseased, and even if the trunk had been bored it was very unlikely that the existence of the disease would have been discovered. The Lord Chief Justice found that it carried a considerable crown, some 35 feet across, but this finding was challenged by the respondents and the evidence on which it is based must be considered later. In the opinion of the Lord Chief Justice its fall was due to a combination of circumstances, namely, the action of the wind on a tree bearing a large crown, the roots of which had rotted to a greater or less extent, and the non-trimming or lopping of the tree or its

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branches. He said (10): "Had it not been for the condition of the "roots, it is probable that the wind was not heavy enough on the "day in question to cause the tree to fall. On the other hand, "had the tree not been bearing the amount of tophamper that it "in fact was, and if it had been topped or pollarded, there is no "reason to suppose that the tree would have fallen when it did, "and it might have stood for a very considerable time." On May 23, 1947, the appellants issued a writ claiming compensation for the damage alleged to have been suffered as a result of negligence or nuisance on the part of the respondents.

In the circumstances set out above the appellants do not now contend that any blame attaches to the respondents for their failure to ascertain the diseased condition of the roots of the tree, but they maintain that in the particular circumstances of this case the respondents were under a duty as reasonable landowners in the proper management of their property to lop, top, or pollard this elm tree, and that, if such action had been taken, the tree would not have fallen when it did, and the appellants would not have suffered the damage complained of. In their submission it is well known that an elm tree is dangerous, treacherous, and shallow-rooted and that either the branches are or the whole tree is liable to fall suddenly; that this was a large tree and well into middle-age, situated close to a busy thoroughfare, and carried a considerable crown; that it had never been lopped, topped or pollarded or otherwise treated at all by the respondents, and it was or should have been obvious to them when they took over the property that no such action had ever been taken; that it was close to a wall so that the ordinary layman would expect that the roots had in fact been cut to enable the footings of the wall to be built; and that for these reasons this particular tree ought to have been suspected and dealt with. Finally, they pointed out that the respondents had ample time either before or after the requisitioning to take the appropriate steps to render it innocuous.

No action of any kind was in fact taken by the respondents until March 1, 1947, when one Chipping was instructed to advise what should be done with this and the other trees on the property, which also appear to have been elms. In calling in Chipping, however, the respondents were not influenced by any suspicion of the soundness or safety of the tree but took action because certain repairs of war damage to the buildings had been completed and they were anxious to put their gardens into good order. Nor, indeed, does Chipping appear to have thought this tree to be the source of any danger. Indeed, so little was such an idea present to his mind that he proceeded to pollard the others first, leaving this tree untouched until they had been dealt with lest they should be injured by its falling boughs; and one result at any rate of proceeding in this order was to withdraw some of the protection from the wind which the tree had formerly enjoyed. I have set out somewhat fully the arguments presented by the appellants in their case, lest I should have failed to give due weight to them.

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(10) [1949] 2 K. B. 66, 67.

One matter may, I think, be dealt with in the forefront of my opinion. It is suggested that a reasonably prudent landowner, seeing this tree and its contiguity to the wall, would suspect that the roots had been cut and that as a result its supports had been weakened or that some disease had been set up. In fact they had not been cut, no questions were put to any witness suggesting that such an eventuality was or should have been present to their minds and no finding to this effect is contained in the Lord Chief Justice's judgment. I see no reason for inferring that a layman would draw such a deduction from the position of the tree. Still less should I be prepared to infer that he would suspect any disease of the roots. Boring into the trunk would not have disclosed it, and the Lord Chief Justice in terms states that he is quite satisfied that there was nothing in the appearance of the tree to indicate that it was in any way diseased. It is true that Mr. Aitkins, an expert called on behalf of the appellants, said that he would have bored the trunk and found out the existence of the disease, but the Lord Chief Justice did not accept his evidence in this respect. If then an expert had been called in to diagnose whether this elm tree suffered from elm butt rot he would have given it a clean bill of health. Whether he would have advised topping and lopping is a different question dependent upon different considerations, but I cannot accept the view that the respondents were negligent merely because they failed to call in an expert to advise as to the possible existence of an unsuspected and undiscoverable disease, even though an expert, if called in, might have recommended topping and lopping.

The issue seems to me to be a broader and more general one, viz., in the case of an apparently healthy elm tree, which was of obviously mature age though by no means old, ought its owners either to have had it lopped and topped or should they at any rate have called in an expert to advise them as to its treatment, and was this course the more imperative in the case of a tree standing near a public and well-used road? The answer in this particular case is somewhat complicated by the controversy as to whether the crown was a very large one or not.

The matter stands thus: Mr. Aitkins, at the beginning of his evidence on this part of the case, was asked: "In your opinion, "is an elm tree of 125 years old, which has never been lopped, "safe?", and replied: "It depends on the size of the head. If "it has a large head it should be lopped". The examination goes on: "*Q.*—Would you leave such a tree standing close to the "highway without having it inspected? *A.*—No, most definitely "not. The Lord Chief Justice: You would not leave any elm "tree close to the highway without it being inspected, would you? "*A.*—No, you would not. The Lord Chief Justice: You mean an "old elm tree, Mr. Fox-Andrews. Mr. Fox-Andrews: Yes, my "Lord. The Witness: Yes, or a tree completely out of balance, "with an enormous head for the height of the bole. Mr. Fox-"Andrews: That deals with inspection. Would you leave any "tree such as this close to the highway without it being lopped? "I say such as this, meaning an elm tree 125 years old or more. "*A.*—No, I would take precautions and have it lopped." He had never seen the tree itself, though he had seen photographs, presumably of it in its fallen state. Yet he expressed the view that it had a very large head and said that Chipping had told him so, though Chipping denied having done so. But even so the stress is mainly laid on an enormous head and inspection to see whether it required lopping rather than upon lopping itself, though at the end the witness does say he himself would take precautions and have it lopped.

Apart from his testimony no evidence as to the size of the head was given on behalf of the appellants except that of one Dunk who was garden superintendent of the St. Marylebone Borough Council. He knew the tree, had seen it in position, said it appeared to be perfectly healthy and had instructed the Air Force to cut away the boughs below seven feet so as not to interfere with passers by. In re-examination he was asked: "Ought elm "trees to be lopped and topped from time to time?", and replied: "I consider, growing near a thoroughfare or open space, I should "certainly lop them if they had got any big tops at all." But beside this question and answer must be set what he had said earlier. The passage runs: "*Q.*—In the course of your inspection "and walking around, supposing you come across a tree which "you regard as a potential danger to the public in any way, do "you, as a fact, report it? *A.*—I do." Admittedly he made no report on this tree.

Later one Prosser, who was one of the respondents' tenants and occupied a flat in the building close to and looking immediately upon the tree in question, expressed the opinion that the crown was by no means a large one, more particularly when compared with others in the neighbourhood.

After his evidence had been given, Dunk was recalled. He said in the first place that after the tree had fallen its top extended right across the road and estimated its crown as about 35 feet. This measurement I take to be the height of the crown, not its

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breadth, as the tree fell lengthwise across the road. Chipping, on the other hand, who removed it and disposed of the timber, said that the tree was about 40 feet in height—that about 12 feet of trunk fell inside the garden and the rest in the road. That would mean 28 feet in the road only, and at best Dunk's estimate must be a rough one. I should myself think Chipping a better judge of its size and, after all, it is not the truthfulness of the witnesses that is in question but their ability to make an accurate estimate. But I do not think its exact size, whether it was 30 or 35 feet, is of much importance. There is nothing to show that even 35 feet would be an exceptionally large head on such a tree. Like Somervell, L.J., I can find no evidence to this effect or to the effect that a prudent landowner would have suspected any danger, and the question admittedly is not how an expert would deal with the tree, but what a prudent landowner would do. So far as the respondents' witnesses are concerned, none appears to have had any suspicion, and if they are to be held negligent it must be because they ought to have envisaged danger.

Unless one is to take the view that every elm tree over 100 years old growing beside a busy street should be lopped and that its owner is guilty of negligence unless he so treats it, I see no reason for imputing a want of care on the part of the respondents. If I did so I should feel obliged to regard Chipping to blame since he not only saw no urgency in getting to work on this tree but even weakened its staunchness by cutting away the branches of other trees in its neighbourhood and leaving it less protected than before. Moreover, it was not in leaf but just coming into bud, so that it had not yet reached the stage at which a heavy strain might be expected to be placed upon its roots.

As I understand the judgment of the Lord Chief Justice, however, he does take the view that any prudent landowner upon whose soil an elm tree of 100 years' growth or over is to be found should foresee the danger of it falling or of its branches breaking away, and this is the basis of his judgment. For this view he finds particular support in the evidence of Mr. Le Sueur, an expert admittedly of great eminence, called on behalf of the respondents.

The Lord Chief Justice's words have been quoted in the Court of Appeal but perhaps I may be excused for repeating them. " . . . it is ", he says (11), " the duty of all owners of property to " manage it in accordance with the principles of good estate " management so that their property may not be in a condition " likely to cause damage to persons lawfully using highways in " the immediate vicinity, and, if good estate management involves

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(11) [1949] 2 K. B. 66, 67.

"the inspection and trimming of trees from time to time, . . . "there is a duty on landowners to carry out those operations. "Mr. Le Sueur, who was called by the defendants, and who "gave his evidence with a frankness which was most refreshing, "said that elm trees should be inspected every five or seven "years, and that if this tree had been lopped it is very unlikely "that it would have fallen when it did. If, therefore, principles "of good estate management require periodical inspection and "cutting, it is not . . . open to an occupier of property who main-"tains on his land trees which immediately adjoin or are very "close to a highway to say, 'Well, I did not know that I ought "'to have done it'."

I take the suggested obligation to manage property in accordance with the principles of good estate management to mean no more than that the party concerned must act as a prudent landowner would. ✓ If it means more I could not subscribe to it. But even so, to the extent that the passage is based upon the impression that Mr. Le Sueur considered that elm trees should be inspected every five or seven years in order to see whether they require lopping, it contains, as I think, a misapprehension as to that gentleman's view. As I understand him, he did not state that an elm, even if mature, should be inspected with a view to lopping at these intervals, but that once it was lopped it ought thereafter to be inspected every five or seven years because after lopping its wounds may rot. He was asked: "If it was lopped, how long "do you think it reasonable to elapse before you lopped it "again?", and answered: "If you treat the wounds very care-"fully, it does not rot as fast as it would if you leave the branches "alone, but ordinarily speaking, I should say five to seven years, "from the lopping point of view. Lopping a tree may make it more dangerous in the end, of course." This evidence expresses no opinion as to when an elm tree should first be lopped. It is concerned only with the question as to the intervals at which it should be inspected after it has once been lopped in order to see if the wounds caused by lopping have rotted.

Mr. Le Sueur's general view as to when an elm tree requires lopping is, I believe, summed up in his statement in answer to the Lord Chief Justice, who said: "I want to know what a prudent "owner should do in deciding whether an elm tree should be "lopped". His reply was: "If the trunk is a straight one and "it has not swelled out at the bottom and does not have rising "roots, and has a comparatively compact crown and has not any "obviously very heavy boughs, that owner should consider his "tree safe. Beyond that, I do not think any reasonable human "being can go". From this view I do not think he ever resiled. Indeed, except possibly in the case of falling boughs, which are not now in issue, he was not inclined to give an exceptionally bad name to the elm tree. "I have", he says, "a very wide "experience of elm, and I think the elm is a rather maligned tree. "It is a very easy statement to make" (i.e., that elms are notoriously untrustworthy). "I know elms have a higher per- "centage of heart rot for the species than other trees, but there "are an awful lot of elms in the country which have not". Undoubtedly he thinks elms less staunch than other trees and that as a matter of theory they should be inspected, as soon as they are big enough to damage anyone if they fall. But he is speaking theoretically and not practically, and of inspection not lopping, and however carefully this tree had been inspected it would have shown no flaw. When the question to and answer of Aitkins: "*Q.*—Would you leave any tree such as this close to "the highway without it being lopped? I say such as this, "meaning an elm tree 125 years old or more. *A.*—No, I would "take precautions and have it lopped", are put to him and he is asked: "Do you disagree with that?", he will go no further than to say: "Not in a general way, no"; a reply which I find of very little assistance one way or the other. But the appellants laid much reliance upon one answer given by Mr. Le Sueur to a question put to him from the bench. He had said: "Judging "from the photograph, I should say it was a normal tree, but "with regard to it not requiring attention, of course, I cannot get "sufficient from the photograph to say anything at all". The Lord Chief Justice then asked him: "Do you think you might "have said, if you went by, 'Why on earth don't they have it "'lopped?'?", and he replied: "Yes, I think so".

If I thought that this answer meant that judging from the appearance of the tree Mr. Le Sueur regarded it as potentially unsafe, the evidence would require very careful consideration before one could conclude that the respondents had exercised due care. But to give his answer this interpretation is to contradict everything he has just said, and the response is so condensed that its meaning is obscure. Had the question been: "Do you think you "*would* have, not you *might* have, said, 'Why don't they have "'it lopped?'?", the witness might be taken to be saying that the tree was, in his opinion, unsafe. As it is, it seems to me merely the scientist's careful reply in a case where he has insufficient evidence to give a certain answer one way or the other. He might or he might not have expected it to require lopping and had not the material requisite to enable him to make up his mind. In any case he is answering as an expert, not as a prudent landowner.

If, as I have said, it is the duty of every owner of an elm tree near or overhanging a road to lop and top that tree as soon as it has reached an early middle age, however sound it is found to be on external examination, then the respondents were negligent; but, short of this, in the circumstances of the case now under consideration, they appear to me to be free from blame whether the case against them is framed in negligence or nuisance. For myself I do not regard the evidence as establishing that elm trees are so plainly a danger as to require their being lopped and topped lest they should fall though to all external appearance they are sound and no inspection would raise a doubt as to their general condition. If such a duty existed there would be, I imagine, a vast number of negligent persons who are only saved from liability owing to the chance that their elm trees have in fact resisted the forces tending to make them fall.

I would dismiss the appeal with costs.

LORD NORMAND. My Lords, the appellants felt themselves unable to support the ground of judgment on which they had succeeded before the Lord Chief Justice. Mr. Le Sueur, one of the expert witnesses, had said that once an elm had been lopped it should, ordinarily speaking, be lopped again five to seven years later because the wounds inflicted by lopping exposed it to the invasion of disease. The evidence that elms should be lopped at brief intervals was taken by the Lord Chief Justice to apply to unlopped elms, and he held on this evidence that it is a reasonable and proper precaution for the occupier of property on which there are elm trees bordering on or near to a public road to lop or pollard them as an ordinary incident of good estate management. I respectfully think that good estate management is not the correct test and that the misunderstanding of the import of Mr. Le Sueur's evidence deprives the finding, so far as it is a relevant finding of fact, of the value which it would otherwise have had.

The Court of Appeal applied what is, I think, the proper test—the conduct to be expected from a reasonable and prudent landowner—and held on the evidence that the appellants had satisfied this test because there was nothing dangerous in the appearance of the tree, no sign of disease, advanced age, disproportion of crown to stem, or rising roots.

The appellants in this House accepted the test applied by the Court of Appeal, but they put forward the proposition that on the evidence it was established that a reasonable and prudent landowner, having on his property a well-grown elm with a large crown, which had not been lopped or topped and which is adjacent to a busy thoroughfare, has the duty either to lop or top the tree or to take the advice of a reasonably competent expert as to the necessary action to be taken for the protection of the public safety.

The test of the conduct to be expected from a reasonable and prudent landlord sounds more simple than it really is. For it postulates some degree of knowledge on the part of landlords which must necessarily fall short of the knowledge possessed by scientific arboriculturists but which must surely be greater than the knowledge possessed by the ordinary urban observer of trees or even of the countryman not practically concerned with their care. The evidence in this case was not directed with the precision which I should have liked to defining the degree of knowledge to be expected from a reasonable and prudent landlord. But it is possible to piece together from the evidence the characteristics of the elm, or at any rate of the common elm, which are notorious or generally recognized by persons concerned with the care of them and which have a bearing on the danger which they may cause when they are growing on or near ground to which the public has lawful access. They are less resistant to wind than the other common British trees; the limbs and branches are more likely to fall; they are more prone to disease; their lateral roots are shallow and their tap root decays with age, so that the trees themselves are also more likely to fall. That knowledge the reasonable and prudent landlord may be expected to possess, and if through lack of it he fails to take appropriate precautions he must bear the consequences. If a landlord is aware of his ignorance about elms he should obtain the advice of someone better instructed, not a scientific expert in the ordinary case, but another landlord with greater experience, or a practical forester, for example.

The elm which caused the damage complained of was a mature tree. It was about 130 years old, as was found when the rings were counted after it was cut up, and though no one could have told its age merely by looking at it while it was still standing it would have been apparent to anyone that it was a well-grown tree. Its growth was upright; it was about 40 feet high; its bole was about three feet in diameter; and its crown, as estimated by a witness whose evidence the Lord Chief Justice accepted, was some 35 feet across. That is, according to the evidence, not an abnormal crown for a well-grown elm 40 feet high, but it can fairly be described as considerable. The tree was growing close to a busy street in North London. The roots were not rising, but some of them were badly affected by rot caused by fungus which usually attacks the tree at the point where it has received a wound. But there was no evidence that the roots had ever been cut. The disease was of long standing, and it had taken an unusual course by moving along the main roots without affecting any part of the trunk. There was nothing in the appearance of the tree to suggest that it was in any way diseased, and the presence of the disease could not have been detected by the methods usually employed when disease is suspected. The fall of the tree was caused by the force of a squally gust of wind acting on the crown and by the diseased condition of the roots.

What would a reasonable and prudent landlord have done about the tree? There is more than enough evidence of what scientific experts would have thought or done, but there is a paucity of evidence about what a reasonable and prudent landlord would have done. The appellants called Mr. Aitkins, who had been a lecturer on forestry at Aberdeen University and was, at the time of the trial, carrying on business as an adviser in forestry. I shall quote a short passage from his examination-in-chief. *Q.*—" In your opinion, is an elm tree of 125 years old, which has " never been lopped, safe? *A.*—It depends on the size of the " head. If it has a large head, it should be lopped. *Q.*—Would " you leave such a tree standing close to the highway without " having it inspected? *A.*—No, most definitely not. *Q.*—You " would not leave any elm tree close to the highway without it " being inspected, would you? *A.*—No, you would not. The " Lord Chief Justice: You mean an old elm tree, Mr. Fox- " Andrews. Mr. Fox-Andrews: Yes, my Lord. The Witness: " Yes, or a tree completely out of balance, with an enormous head " for the height of the bole. Mr. Fox-Andrews: That deals with " inspection. Would you leave any tree such as this close to the " highway without it being lopped? I say such as this, meaning " an elm tree 125 years old or more. *A.*—No, I would take " precautions and have it lopped." In his re-examination he is asked: " If you had found this tree at about 130 years old and " in this position with a very large crown which had never been " lopped, what would you have said was the proper thing to do " from the point of view of public safety, quite apart from disease? " *A.*—To have it lopped and docked to safe proportions for the " benefit of the public, without any doubt." Reasonable exception may be taken to the description of the crown as very large, but, allowing for that, I think that this witness does support the proposition advanced by the appellants.

One Dunk, garden-superintendent of the St. Marylebone Borough Council, was also called by the appellants. During the war he had observed this tree and had asked the occupants to cut some branches which were lower than seven feet from the ground. This was in the exercise of a statutory power and the occupiers complied with his request. He was asked in cross-examination whether he would report if he came across a tree which he regarded as a potential danger to the public and he said that he did, but he had never had occasion to make any adverse report on this tree. In his re-examination he said of elm trees in general that he would lop them, though they were not apparently diseased, if they were growing near a thoroughfare or in an open

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space and had " any big tops at all ". The appellants do not in my opinion obtain much advantage from the evidence of Dunk.

Of the respondents' witnesses, one Gabell, a maintenance surveyor employed by the agents, who managed the property on which the tree grew, said that it was similar in size to many other elms in the neighbourhood. He had advised that this tree and others growing beside it should be topped not because of any question of safety but to let more light and air into the garden of the respondents' block of flats. Chipping was employed in March, 1947, by the agents to top this group of trees. He said that there was nothing whatever which would have led him to say that he was suspicious of this tree. He left the topping of it to the last because that suited the work he had to do and he does not seem to have thought that his men working near it were running any risk. In cross-examination he stated that he had lopped or topped many elm trees close to highways or property, though they were less than 100 years old, but this bare statement without more detail is of little assistance in the case. Mr. Le Sueur, another witness for the respondents, holds a special diploma in forestry and arboriculture and has long been a consultant in forestry. He is a specialist and a scientist, but he showed more than once in his evidence his understanding that the reasonable and prudent landlord was not to be expected to have his knowledge of trees and their treatment. The Lord Chief Justice was favourably impressed by him and commended his frankness. By experience and by the quality of his evidence I think that he is by far the most important witness on this question of the alleged duty to lop elm trees.

In his examination-in-chief Mr. Le Sueur explained the considerations which would guide him in advising whether to lop an elm tree—whether it is standing where unsuspecting people go; whether it is standing upright or inclined; the size of the crown; whether any work had been done which might have damaged the roots. He sums up thus:—" If the trunk is a straight one and " it has not swelled out at the bottom and does not have rising " roots, and has a comparatively compact crown and has not any " obviously very heavy boughs, that owner should consider his " tree safe. Beyond that I do not think any reasonable human " being can go." In his cross-examination, after some introductory matter, in which he said that the elm is a rather maligned tree but that it is nevertheless more dangerous than other trees and that it owes much of its popular ill-repute to damage caused by the falling of branches, he is asked, " If you have got a tree " 130 years old standing in a position in which if it falls or a " branch falls a member of the public may be killed, and if you " have occupied the land for years, ought you not at some time "to have it inspected? *A.*—Well, I think so; though, of course, "I may say that if everybody thought so I would be a much "richer man than I am now—the enormous number of trees that "are never inspected." The duty of inspection is put to him in a series of questions following upon this. Then the evidence of Mr. Aitkins embodied in the answer to the last question in the passage which I have quoted above is put to him, and he says that in a general way he would not disagree with it. I must refer also to a question put to him by the Lord Chief Justice at the end of his re-examination. He was asked: "Do you think you "might have said, if you went by, 'Why on earth don't they "'have it lopped?'? *A.*—Yes, I think so."

My Lords, I hope that I have fairly and adequately summarized Mr. Le Sueur's very important evidence. After repeated consideration of his evidence as a whole, I think that it comes to this: that a reasonable and prudent landlord would inspect or cause to be inspected any good-sized elm growing in a place where unsuspecting persons may lawfully approach it; that this inspection is for the purpose of deciding whether to have it lopped; and that if the trunk is straight and there are no rising roots, a comparatively compact crown, no obviously very heavy boughs and, it may be added, no sign of rot or disease, the owner may count the tree safe. He himself, if inspecting on behalf of the owner, would certainly have lopping or topping very much in mind and would, judging from his answer to the Lord Chief Justice, begin by asking not whether it ought to be lopped, but whether it ought not to be lopped. But I think it would be unfair to him to conclude that he resiled from his evidence that if the trunk is straight and has not swelled out at the bottom, and if there are no rising roots, and the crown is comparatively compact and there are no obviously heavy boughs, the owner would consider his tree safe. From his evidence, as also from the evidence of Gabell, it is plain, as indeed everyone who can recognize an elm can see for himself, that, if there is a duty to lop or top all well grown elms in or near public places, it is a duty which is not observed by a vast number of owners public and private.

The next question is whether the respondents performed the duty of inspection which, I infer from the evidence of Le Sueur, a reasonable and prudent landlord would perform. Plainly they did not. But it is not less plain that, if they had, it would probably have made no difference. The tree was just such a tree as Mr. Le Sueur says the owner might consider safe. I cannot hold that the appellants have satisfactorily proved that the negligence was a cause of the accident by which they suffered the damages for which they sue. In general I respectfully agree with the judgment in the Court of Appeal.

The appeal should in my opinion be dismissed with costs.

LORD OAKSEY. My Lords, I agree with the judgment of Tucker, L.J. The respondents' duty was to act as ordinary prudent landowners would act. Landowners are not all experts in the management of trees, and those who are not perform their duty if they take reasonable steps to employ persons who are experts. The respondents employed a well known firm of estate agents to manage this property, and they in their turn employed Chipping, a timber contractor, who has been engaged in timber felling since 1915. It was decided between one Gabell, a maintenance surveyor of the agents, and Chipping that the trees in front of the respondents' flats, including the tree in question, should be lopped and topped generally to open up the gardens to get more light and air into them so that the grass and flowers might grow.

It was not suggested in cross-examination either to Gabell or to Chipping that the trees were being lopped for any other reason or because they appeared to anyone to be unsafe. On the contrary, Chipping said when asked: *Q.*—" To you, a man who has " been engaged in the timber business and tree felling business for " a good many years, walking up to that tree on March 1 and " looking at it, was there anything which would have led you to " say ' I am very suspicious of this ' ? *A.*—Nothing whatever." What more would the ordinary prudent landowner do? Chipping was not a servant of the respondents. It cannot be that a landowner must consult other experts or that because experts may be called at the trial after an accident who think the accident might have been foreseen that the landowner who did not consult them or act in accordance with their view is negligent. As a matter of fact none of the experts called in the case, who had seen the tree before it fell, thought it appeared dangerous, and it is not at all clear, in my view, that even the expert witnesses who had not seen the tree in growth would have considered it dangerous.

For these reasons I am of opinion that there was no evidence that the respondents failed in their duty to take reasonable care in the management of their premises, and that the appeal should be dismissed.

LORD REID. My Lords, I have no doubt that a person who has a tree which is in such a position that it or some of its branches may fall and injure some person passing along a busy thoroughfare is under some duty to those who pass. The place where the accident happened out of which this case has arisen was a busy street in London, and in what I say I do not intend to express any opinion about the extent of the duty of a person who has trees near an unfrequented highway or near some other place to which the public have access. I think that the respondents' duty was to take such steps to prevent danger as a reasonable man in the respondents' position would have taken. In 1940 they became lessees of a block of flats in the forecourt of which stood a number of trees. The premises were requisitioned from 1941 to 1946, when the respondents regained possession. On April 7, 1947, one of the trees in the forecourt fell across the adjoining street and struck a motor car in which the appellants were travelling. It is clear that the respondents were entitled to deal with this tree, but they had done nothing to it. The question is whether its fall on that occasion was due to negligence on their part. No separate case of nuisance is now maintained.

I think that the respondents' duty was not limited to dealing with any danger of which they might happen to be aware; and if a person has any further duty than that with regard to trees his first step must be to look at those trees which are near the highway or to get someone else to do so on his behalf to see whether any of them is dangerous. The respondents, being a company, could only adopt the latter alternative. I think that it was their duty to have this tree inspected within a reasonable time, and it was not suggested that they did not have before the accident ample time to do this and to consider the results of an inspection and take any necessary action. In fact in January, 1946, before the end of the period of requisition, they appointed a firm of auctioneers and surveyors as their managing agents. But those agents never inspected the trees in the forecourt to see whether they appeared to be safe or not. After certain repairs were completed and in the course of "tidying up" they ordered a contractor to top and lop the trees to let in more light and air, and the contractor would have reached the tree which fell a few days after the accident. But this operation had nothing to do with safety and any steps with that object could and should have been taken much earlier. It is not material to this case to consider whether or not the managing agents had any duty under their contract with the respondents to see to the safety of the trees. If they had not, the respondents failed in their duty because they did nothing about safety. If the managing agents had a duty under their contract, they failed to carry it out; but the respondents would not be absolved by engaging agents to carry out their duty if in fact those agents did nothing.

But it is not enough for the appellants to prove that the respondents failed to take any steps: to succeed they must also prove that proper inspection ought to have led to something being done which would have prevented the accident. The tree in question was an elm tree. The evidence shows that its roots were much weakened by disease, but that disease had taken an unusual course and no reasonable examination, even by an expert in tree diseases, would have disclosed this danger. The tree was perfectly healthy in appearance but that appearance was deceptive and the hidden weakness in its roots led to its fall. In these circumstances the first question to consider is, I think, whether the evidence in this case establishes that every fully grown elm tree in a dangerous position ought to be lopped or otherwise dealt with as a safety precaution no matter how healthy it may seem to be. It is only if that is not proved that it is necessary to go on to consider whether there was anything special about this tree which should have been apparent on inspection and which called for precautionary action.

Lord Goddard, C.J., who tried the case, found for the appellants on the first question. I think that the basis of his decision is contained in this sentence (12): "In the "present case the evidence satisfies me that it is a reason-"able and proper precaution for the occupier of property "on which there are elm trees bordering or near to the "road to top or pollard them as an ordinary incident of good "estate management." This is so broadly stated as to include all fully grown elm trees (I assume that young trees were not intended to be included) and if I could find evidence to support this conclusion I would be very reluctant to disturb it. But with all respect I cannot find that evidence. If it were an ordinary incident of good estate management or a general practice to lop or pollard or otherwise remove parts of all fully grown elms standing near roads, whether the tree appeared to be normal and healthy or not, that must have been known at least to the expert witnesses who gave evidence in this case but no witness speaks of such a practice. Mr. Aitkins, the expert who gave evidence for the appellants, carries on business as a forestry adviser and has been a university lecturer. He gave evidence at some length to show that inspection would have revealed peculiar features about this tree, in particular the root disease, which required that action should be taken, but his evidence as to what should have been done on the assumption that inspection revealed nothing abnormal was confined to a few short answers. It had been found by counting the rings in a section of the trunk after the tree had fallen that the tree was about 130 years old and Mr. Aitkins, who never saw the tree, said that he had been told that it had a very large crown and he thought that this was so from looking at a photograph of the fallen tree. He was then asked: "In your "opinion, is an elm tree of 125 years old, which has never been "lopped, safe?" and he replied: "It depends on the size of the "head. If it has a large head it should be lopped." He then referred to an old elm tree or a tree " completely out of balance, " with an enormous head for the height of the bole " and when asked " Would you leave any tree such as this close to the high-" way without it being lopped? I say such as this, meaning an " elm tree 125 years old or more," he replied: " No. I would " take precautions and have it lopped." In re-examination he was asked, leaving the question of disease entirely out of account: " If you had found this tree at about 130 years old and in this " position with a very large crown which had never been lopped, " what would you have said was the proper thing to do from the " point of view of public safety, quite apart from disease?" and he replied: " To have it lopped and docked to safe proportions " for the benefit of the public, without any doubt." Not only does Mr. Aitkins nowhere say that there is any general rule or practice of lopping elms in the interests of safety, he does not even say that in his opinion there ought to be. When he advocates lopping it is always with reference to trees with large crowns or with some other particular feature. The other expert who gave evidence is Mr. Le Sueur. He is highly qualified and has been in practice as a consultant for twenty years. Lord Goddard, C.J., said of him that he gave his evidence with a frankness which was most refreshing. When he was asked what a prudent owner should do in deciding whether an elm tree should be lopped, he said: " If the trunk is a straight one and it has not swelled out " at the bottom and does not have rising roots and has a com-" paratively compact crown and has not any obviously very heavy " boughs that owner should consider his tree safe. Beyond that " I do not think any reasonable human being can go ". He agreed that an elm should certainly be inspected with a view to lopping before it is 100 years old but he did not say that it should certainly be lopped. He was asked whether he disagreed with Mr. Aitkin's answer which I have quoted: " No, I would take " precautions and have it lopped " and he replied: " Not in a " general way, no ". I cannot find that any of the other witnesses refers to dealing with elms as an ordinary incident of good estate management or speaks of any general rule that all elms near a road should be lopped. All the witnesses agree that elms are more dangerous than other trees commonly found in this country, partly because the branches are apt to fall unexpectedly and partly because they are shallow rooted, and I think that it is plain that action should be taken if there is any reason to suspect weakness on inspecting any particular tree. But that is quite another thing from lopping all elms irrespective of their condition as an ordinary incident of good estate management.

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(12) [1949] 2 K. B. 67.

So in my judgment the appellants can only succeed in this appeal if they can show that there was something about this

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particular tree which should have suggested that lopping or other action was necessary. What inspection will suggest will depend on the knowledge and experience of the inspector, and there has been some controversy about the degree of knowledge and experience necessary for adequate inspection. Plainly it would be no use to send a person who knew nothing about trees. The alternatives put forward were that he should be an expert or that he should have at least such knowledge and experience of trees as a landowner with trees on his land would generally have. As the question depends on what a reasonable man would do I think that it may be put in this way. Would a reasonable and careful owner, without expert knowledge but accustomed to dealing with his trees and having a countryman's general knowledge about them, think it necessary to call in an expert to advise him or would he think it sufficient to act at least in the first instance on his own knowledge and judgment? The evidence in this case does not suggest to me that he would, and does not convince me that he should call in an expert. There must be many owners of elm trees beside busy roads and if it were proper for them to seek expert advice I would expect, making every allowance for the facts that not all owners are reasonable and careful and that even reasonable people frequently omit to do what they know they ought to do, that it would appear that expert advice was not infrequently sought. But the evidence in this case does not bear this out.

Mr. Le Sueur gave clear evidence that inspection was necessary but did not say that it should be or commonly was by an expert, and Chipping, a contractor accustomed to dealing with trees, spoke of a number of his clients who had engaged him to lop elms but not of any who had consulted him as to whether their trees should be lopped. In his experience apparently the decision to lop was the unaided decision of the client. So I think the question is whether a person with general knowledge and experience of trees would or should have advised the respondents that this elm tree, notwithstanding its normal healthy appearance, ought to be lopped or at least that there was such doubt that expert advice should be sought if it was desired to keep the tree untouched. It appears from the evidence that lopping is an operation which can damage a tree. It wounds the tree and, according to Mr. Le Sueur, even if the wound is carefully treated, the tree should not be left untended thereafter for more than five or seven years. He said: "Lopping a tree may make it more "dangerous in the end, of course". But he admitted that if this tree had been lopped any immediate danger would have been removed.

Apart from the root disease, which could not have been detected on inspection, the two features of this tree which are dealt with in the evidence are its age and the size of its crown. When this tree fell, the rings were counted in a section of the trunk and its age was found to be about 130 years. The experts were agreed that this is only middle age for an elm. Mr. Aitkins said that an elm can reach the age of 500 years provided it is not exposed to wounding. There is no evidence of how the approximate age of a growing tree can be determined, or whether an elm of 130 years old would appear to a person of ordinary knowledge different from a younger tree which had just attained full stature, and I can find no basis in the evidence for the suggestion that, while it may be safe as a general rule to leave a younger elm unlopped, it is different when it comes to such an age as 130 years. In my opinion it is not proved that on inspection the age of the tree alone ought to have suggested that action was necessary.

The main feature relied on for the appellants was the size of the crown. The experts were agreed that any tree with a very large crown ought to be lopped for safety and I think that a person with general knowledge of trees would take the same view. But how large was this crown? Mr. Aitkins, who never saw the tree, thought from information given to him and from looking at photographs of the fallen tree that it was very large. One witness, Dunk, being recalled, estimated its diameter at 35 feet and thought it was large, but the experts were not asked whether a 35 feet crown would be large for a tree of this character. Dunk was an officer of the borough council and he had observed the tree in the course of his duties: he said that when he came across a tree which he regarded as a potential danger he reported it, but he made no report about this tree. The maintenance surveyor of the respondents' managing agents, asked whether it appeared to be an unusually large top, said it was quite in keeping with the rest of the trees in the neighbourhood; but no doubt he had an interest, as his firm might be blamed for taking no action. A resident who saw the tree every day saw nothing unusual about it: he was interested in elm trees but may not have had much knowledge. The contractor, who was engaged in topping and lopping the trees and knew something about trees, saw nothing abnormal about this tree and said he thought the crown not a large but an ordinary one: but Aitkins said that this contractor had told him that it was a very large crown. Mr. Le Sueur did not see the tree and when asked whether the photograph showed anything abnormally large about the top he said he would not like to answer that question. The evidence which gives me most difficulty on this question is a passage in his re-examination: "If I looked at this photograph I would not "say 'Good gracious what is the matter with this tree'.

"*Q.*—Would you say 'Good gracious what an enormous "'tree; it ought to have been lopped' or would you say "that it was a normal tree, not calling for attention? *A.*— "Judging from the photograph, I should say that it was a "normal tree, but with regard to it not requiring attention, of "course, I cannot get sufficient from the photograph to say anything at all. The Lord Chief Justice: Do you think you might "have said, if you went by: 'Why on earth don't they have it "'lopped?' *A.*—Yes, I think so". If the last answer means that Mr. Le Sueur thinks that he would have thought lopping appropriate even at a glance, that would tell very strongly in favour of the appellants, because if the matter was so clear to him as that it surely ought not to have escaped the notice of a less highly qualified inspector. But, if he meant that, this answer is quite out of line with the rest of his evidence. I do not think that he can have meant more, in assenting to what was suggested to him, than that if he had seen the tree he might have seen something which called for lopping. The rest of his evidence is to the effect that so far as his information went it did not suggest that.

But perhaps the best reason for not attributing too much importance to this passage is that it is not mentioned in the judgment of Lord Goddard, C.J. (13). He refers to the tree as carrying "a considerable crown" and "bearing a large crown" but, as I have already said, he does not base his judgment on this. The matter was argued again in the Court of Appeal and I agree with the opinion of Tucker, L.J. (14): "If the judgment had been based "on the ground that the crown of the tree was of abnormal size, "so as to make it apparent to a layman that it was a potential "danger, I should have been of opinion that the evidence was not "sufficient to justify such a finding. A study of the judgment, "however, satisfies me that it was not based on this finding. The "Lord Chief Justice does not say it was abnormal, merely that it "was large or considerable, which I take to mean no more than "that it was the kind of crown which an elm tree of this age, "which had never been lopped, might be expected to carry". So I do not find, either in the judgment of Lord Goddard, C.J., or on a reconsideration of the evidence, enough to establish that there was anything unusual about the size of the crown. The case is a difficult one, and I have not reached my conclusion without some hesitation, but in the end I have come clearly to be of opinion that the appeal should be dismissed.

LORD RADCLIFFE. My Lords, I should have preferred to see this appeal allowed. But, since the majority of your Lordships take a different view, I am not prepared to dissent. The difference that would have been between us would not have been one of principle: it would in fact have been confined to the proper interpretation of the evidence given at the trial by one witness, Mr. Le Sueur. Left to myself I should, though not with certainty, have deduced from the written record of his testimony that he left the court in little doubt that in his opinion it would have been the reasonable and proper thing for the owner of this elm to have had it lopped; and I think that the Lord Chief Justice, who had the advantage, denied to us, of hearing and seeing Mr. Le Sueur, did so understand him. Again, I think that Mr. Le Sueur probably did mean to convey that a "well-grown fully-branched elm tree" ought to be lopped every five or seven years to ensure safety, and I doubt very much whether that estimate depends at all on the consideration that lopping may promote decay. In fact, he says that if you treat the wounds very carefully the tree does not rot as fast as it would if you leave the branches alone. But the truth is that the evidence is not in a satisfactory state for the purposes of an appellate court. There is too much ambiguity in some of the questions, and there are too many inconclusive answers that were left unresolved. If the majority of your Lordships take the view that the evidence as a whole leaves no reasonable certainty as to what, if anything, it would have been prudent to do to this tree, had it been inspected, I think that that is the best proof that the plaintiffs at the trial failed to make out their case.

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(13) [1949] 2 K. B. 65.

(14) [1949] 2 K. B. 64, 70.

I hope that I do not misinterpret the significance of this decision if I say that I do not think that it can be the last word on the position or liability of the tree-owner. To say that it is a natural use of land to grow trees upon it seems to be too wide a generalisation to be of much use in practice. It would be conceded, I believe, that there is somehow a difference between the legal responsibilities of the owner of a mature forest tree, in a built-up area, immediately adjacent to a busy street, and the responsibilities of the owner of a stand of timber bordering a country lane. But is the difference only this, that the latter is entitled to take more chances at the expense of his neighbours than the former? I am not certain of the logic, for a tree or its branch only falls once; and it must be poor consolation to an injured passer-by in the country lane to be assured that the chances were all against his being at the place of the accident at the moment when it occurred. The accepted test that liability only begins when there is apparent in the tree a sign of danger has the advantage that it seems to ignore, or to a large extent to ignore, the distinction between the spot that is much, and the spot that is little, frequented; but, on the other hand, I think that it does end by making the standard of the expert the test of liability. Anyone can own a tree: there is no qualifying examination; but to how many people in this country can be credited as much general knowledge as will warn them that a tree's top is unusually large or that it is in fact diseased, dangerously or otherwise?

My Lords, I have formed no final view on any of these points. I allude to them only because I think that they still await final exposition and that it would be regrettable if they were regarded as finally determined by the authority of this case.

Appeal dismissed.

Solicitors: *G. Howard & Co.; Barlow, Lyde & Gilbert.*

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Mar. 13, 14, 15, 16, 20, 22, 23, 27, 28, 29, 30;
June 30.

WORKINGTON HARBOUR AND DOCK BOARD . . . . APPELLANTS;

AND

TOWERFIELD (OWNERS) . . . . . RESPONDENTS.

Shipping—Ship—Stranding—Channel approaching harbour—Obstruction by silt—Negligence of harbour authority—Failure to warn pilot and master—Liability of harbour authority—Negligence of compulsory pilot—Responsibility of shipowner—Harbours, Docks and Piers Clauses Act, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 74—*Pilotage Act,* 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *s.* 15.

In 1941 a ship in charge of a compulsory pilot, approaching an English harbour through a channel, went aground on an undredged accumulation of river silt, sustaining damage. It was conceded on behalf of the shipowners that she had also caused damage to the harbour.

The House of Lords found unanimously that there was negligence on the part both of the harbour authority and of the pilot and (per Lord Porter, Lord Normand, Lord Morton of Henryton and Lord Radcliffe, Lord Oaksey dissenting) that the negligence of the pilot as well as that of the harbour authority contributed to the casualty. The harbour authority were negligent in that they failed to discharge their duty to ascertain the condition of the channel and to communicate the relevant information either to the master or to the pilot the ship was compelled to take.

Per Lord Porter, Lord Normand and Lord Morton of Henryton:

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* *Present:* LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD RADCLIFFE.

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The duty to give warning to the master arose from the relationship of invitor and invitee.

The provision of s. 15, sub-s. 1, of the Pilotage Act, 1913, that "the owner or master of a vessel navigating under circumstances "in which pilotage is compulsory shall be answerable for any loss "or damage caused by the vessel or by any fault of the navigation "of the vessel in the same manner as he would if pilotage were not "compulsory" has the effect of rendering the owner responsible so that he is both liable for the loss or damage caused to others and debarred from recovering any damage which he himself has suffered.

Contributory negligence by the harbour authority is no defence to a claim by them under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, for damage caused by the ship to the harbour. So held per Lord Porter, Lord Normand, Lord Morton of Henryton and Lord Radcliffe, Lord Oaksey dissenting.

Great Western Railway Co. v. *Mostyn* (*Owners*) [1928] A. C. 57, applied.

The damage recoverable under s. 74 of the Act of 1847 is confined to that physically caused to the harbour works and does not therefore include consequential loss of revenue through inability to use the harbour.

Decision of the Court of Appeal (sub nom. *Towerfield* (*Owners*) v. *Workington Harbour and Dock Board*) [1949] P. 10, reversed.

APPEAL from the Court of Appeal (Scott and Asquith L.JJ., Bucknill L.J. dissenting).

The plaintiffs (the respondents in this appeal) were the owners of the steamship *Towerfield* and they claimed against the defendants (the appellants in this appeal), the Workington Harbour and Dock Board, in respect of damage sustained by the ship through grounding on October 19, 1941, in the approaches to Workington Harbour, to which, it being war time, she had been directed by the Ministry of Transport. They based their claim on negligence and alternatively on contract. The latter claim was based on an alleged breach of contract or warranty by the defendants that the condition of their harbour was in accordance with a statement and plan inserted on the appropriate Admiralty chart from 1933 onwards and inscribed: "From a plan supplied "by the Harbour and Dock Board, 1931, with additions from the "ordnance survey." The defendants denied liability and counterclaimed against the plaintiffs in respect of loss and damage sustained by them through the grounding of the ship, which they alleged was solely due to the negligence of those in charge of her. Alternatively they claimed that, in the absence of negligence on the part of those in charge of the ship, the loss and damage sustained by them constituted damage done by the ship to the harbour, in respect of which they contended that under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, the plaintiffs as owners were answerable to them as undertakers. The defendants admitted that in consequence of the grounding the *Towerfield* sustained serious damage and the plaintiffs in their turn conceded that the defendants suffered loss and damage such as would constitute damage done to the harbour within the meaning of the Act of 1847. Willmer J. found that, though the defendants were negligent, the grounding of the ship and consequent damage were solely due to the pilot's negligence for which the plaintiffs were liable. He accordingly dismissed the plaintiffs' claim and gave judgment for the defendants on their counterclaim. The Court of appeal held unanimously that the counterclaim failed and further (per Scott and Asquith L.JJ., Bucknill L.J. dissenting) that the plaintiffs' claim succeeded. Bucknill L.J. would have allowed the appeal in part, but so far as the claim was concerned, he followed the findings of fact and inferences of Willmer J.

The facts relating to the stranding, which in substance were not in dispute, were set out by Lord Porter, adopting the narratives of Willmer J. and Bucknill L.J., as follows: The port of Workington was formed by the estuary of the River Derwent, and comprised an entrance channel, a turning basin, the Prince of Wales' Dock, and a tidal dock and harbour. The entrance channel ran in a north-west to south-east direction, and parallel with it on the south side was a pier, known as the south pier, extending some distance into the sea. The turning basin, which lay at the inner end of the entrance channel, was protected on the north by an L-shaped jetty, known as the north jetty. Seaward of the outer end of the north jetty, and on the north side of the entrance channel there were at one time two perches, the outer of which was approximately opposite the end of the south pier and was known as the barrel perch. The inner perch, which was known as the bush perch, was about half-way between the barrel perch and the end of the north jetty. Vessels proceeding to the Prince of Wales' Dock, where the principal loading and discharging berths were situated, had to come up the entrance channel between the perches on the north side and the south pier on the south side, and upon reaching a certain point had to make a turn under port wheel into the turning basin, whence access to the dock was obtained. It was common ground that at the time of the casualty in this case the barrel perch was not in place. It was agreed, however, that the bush perch was there, though its precise location was the subject of some dispute. Two leading beacons, situated on a waste piece of land called the shipbuilding yard, which lay ahead of a vessel proceeding up the entrance channel, were provided, and these when kept in line were supposed to afford a guide for vessels entering the port.

In the year 1931, in consequence of representations made to

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them by the defendants, the Admiralty agreed to publish, and did publish as an inset on Chart No. 1346, a plan of Workington Harbour. This inset was expressed to be based on a plan supplied by the defendants and showed the entrance channel as having a width of 250 ft. Furthermore the line of the leading marks, which was stated to be 131 degrees true was shown as following substantially the middle of this 250 ft. channel—if anything it was a little to the southward of the centre line. It was stated on the inset that in the approach channel and turning basin a depth of 4½ ft. at chart datum was maintained by dredging. This depth corresponded to 7 ft. below L.W.O.S.T., and was in fact the same as that over the Prince of Wales' Dock sill.

In fact the information given on the Admiralty Chart Inset was inaccurate and misleading. The advertised dredged depth had seldom, if ever, been maintained throughout the whole of the 250 ft. channel. There was a bar abreast of the seaward end of the south jetty where silt tended to accumulate and where depths substantially less than that advertised were habitually to be found. Also on the south side of the channel along the south pier, and also along the northern side opposite to it, banks tended to form and had the effect of constricting the width of the navigable channel to something substantially less than the advertised width of 250 ft. The formation of these banks depended largely on the weather, the prevailing south-west wind having a tendency to cause a littoral drift of slag and rubble which swept along the coast and round the end of the south pier, to be deposited along the side of the channel. Floods in the river Derwent also tended to cause a deposit of silt in the channel, particularly on the north side. In consequence of these difficulties it appeared that the defendants had never really succeeded in maintaining their advertised depth throughout the length and breadth of the entrance channel. Moreover, it was not the fact that the line of the leading beacons led along the centre of the 250 ft. channel, or to the south of it. On the contrary it led substantially to the north of the centre line. The reason for this, it appeared, was that in 1927, when the Prince of Wales' Dock was opened, the entrance channel was originally constructed to a width of 150 ft. only. The leading beacons were then erected to guide an incoming vessel down the centre of this 150 ft. channel. In 1931 it was decided to widen the channel, by dredging a further width of 100 ft. along the south side. The leading beacons were, however, left in their original positions, so that instead of providing a lead along the centre of the channel as it now was, they led approximately 50 ft. to the northward thereof. The inset was inaccurate in this respect when it was first published and was inaccurate in 1941 at the time of the casualty to the *Towerfield*.

In addition to the leading beacons, dredging marks were provided to show the northern and southern limits within which dredging was to take place. These marks consisted of two pairs of posts erected in the shipbuilding yard, close to the leading marks. The northern pair of posts, known as the north dredging marks, when in line, indicated the northern limit of dredging. The southern pair of posts, called the south dredging marks, similarly indicated the southern limit.

The *Towerfield* was a steel screw steamship of 4,241 tons gross register, 373 ft. long and 52.4 ft. beam, and at the time of her stranding was laden with a cargo of manganese ore. Her draft was 23 ft. forward and 24 ft. aft. On the morning of October 19, 1941, she anchored outside the port where she was boarded by Trinity House pilot Craig. In her case pilotage into the harbour was compulsory. The weather was clear with a strong south-westerly breeze, and the tides were spring and making. High water was at 11.8 a.m. with a predicted rise of tide producing a depth of 30 ft. 1in. on the dock sill at high water, but the actual depth on the sill was 31 ft. 6 ins.

After Craig had come out to the *Towerfield* he received a message from the harbour master that the defendants' harbour tug was not available to help to navigate the ship into the dock, owing to boiler trouble. Apparently he was not informed earlier because the harbour master did not know that the tug was out of action until after the pilot had started to go out to the ship. The evidence of Craig was that he then said to Captain Rowden, the master of the *Towerfield*: "There is no tug boat. What do "you think about it?" The master replied: "What do you "think about it?" Craig replied: "Well, it is quite safe, I "think. I think we can manage all right". He also asked the master whether the ship was handy, as she would have to be handy for the engines if they went in without a tug, and the master replied that she was. The master said in his evidence that after they had got a message that the tug had broken down the pilot asked him whether he thought it was safe to go in, and the master replied: "Do you think it is safe?" The pilot said: "Yes", and (to quote from the master's evidence) "as the port "was perfectly straight according to the chart I said I would "go in; I could not see any danger." Substantially therefore their accounts agreed.

The master had never entered Workington Harbour before and said that he relied on the pilot's local knowledge when accepting his decision to bring the ship in. There was nothing on the inset of Workington Harbour printed on the Admiralty Chart No. 1346 to indicate that there would be any difficulty in navigating the ship up the channel. Neither Craig nor any agent of the defendants warned the master of any silting up in the channel which substantially reduced its width.

The steamship *Ashbury*, also inward bound to the Prince of Wales' Dock and in charge of Trinity House pilot Stevenson, entered the channel about half an hour before the *Towerfield* and was docked in safety. The *Ashbury* was loaded, had a beam of 50 ft. and had a draft of 22 ft. 1 in., but she had about 18 ins. less water when she entered the port than the *Towerfield* and therefore the amount of water under her bottom in the dredged channel would be about the same as the *Towerfield*. The latter vessel crossed the bar at the seaward end of the south pier at 11.10 a.m., two minutes after high water, steamed up the channel at a speed of about 3 knots, and after going about 400 yds. took the ground on the north side of the channel about 500 yds. from the entrance to the Prince of Wales' Dock. Efforts to get her off failed and on the ebb tide she broke her back. After she had settled aground she was angled 7 degrees to port of the line of the channel and when she came to rest her starboard bilge amidships was 42 ft. to the northward of the line of the leading marks. This put the ship's port side about 94 ft. from the line of the leading marks and 4 ft. on the channel side of the line of the north dredging marks at the place of stranding. There was no evidence as to how much of the lateral width of the ship was aground when she stranded. The evidence, however, was that the bottom at the place of grounding was silt, and this indicated that she was not held up by merely grounding with her port bilge.

One Deane, a consulting engineer called in on behalf of the respondents, took soundings round the ship when aground and said that if the ship had passed 5 ft. further away from the perch she would still have touched the ground. The fact that the ship listed about 14 degrees to starboard as the water fell indicated that she was aground on a sloping bank. The *Ashbury* passed safely by the bush perch with her port side about 70 ft. from the line of the leading marks, from which it might be inferred that the *Towerfield* when she grounded had at least 28 ft. of her bottom with water under it, because her starboard bilge was only 42 ft. from the line of the leading marks. At the trial there was an issue of fact whether the *Towerfield* took the ground whilst proceeding on a steady course up the channel or whether before she took the ground she had lost steerage way and was set to leeward by the south-west wind on her starboard beam. On this issue the learned judge decided that the ship was coming up substantially parallel with the line of the channel and roughly in the position, with reference to the line of the leading marks and the line of the north dredging marks, which was occupied by her midships section when she was aground. This finding agreed with the evidence from the ship that she quietly came to rest when she took the ground and was not set to leeward.

It followed therefore that the ship stranded because Craig was deliberately bringing her up the channel in a position in which as it turned out there was insufficient water for her, and the question arose whether Craig in doing this showed a lack of such care and skill as might be reasonably expected of a licensed Trinity House pilot.

Craig did not suggest that he told the helmsman to keep the ship on a course with the leading marks in line, or that the helmsman disobeyed any of his orders. He chose to come up to the northward of those marks because, as he said, he wished to counteract the freshet, which was coming down the river and would press on the ship's port bow as soon as the tide started to ebb. He knew that there was a bank which obstructed a large area across the south side of the dredged channel and thought that if the ship was steered on the line of the leading marks a freshet which impinged on the north bank and was thrown off from it would strike the ship on the port bow and tend to push her head to starboard with the result that she would be set over to starboard and be in danger of getting ashore on the south bank before she could recover herself under port wheel. He considered that the safest way to navigate her up the channel was to keep the leading marks slightly open to the northward. The bush perch was erected about 500 ft. on the seaward side of the end of the north jetty, and he gave as another reason for keeping to the northward of the line of the leading marks in its vicinity that the ship had to round the end of that jetty under port wheel in order to enter the Prince of Wales' Dock, that the more he got to the southward, the sharper his turn would be, and that he was anxious not to have then to make too sharp a turn. Moreover if he had the flood tide under him he might have to reverse his engines before starting to round under port wheel and this again would tend to cant his head to starboard, especially if he had no tug to assist him in his turning manœuvre. The result of all these difficulties of navigation was that Craig when he got near the bush perch ceased to keep the leading marks in line and passed as near to the bush perch as he thought he could safely go. As he himself said: "You had to hug the perch very close to get "up in the basin."

He therefore did not keep on a course with the leading marks in line and relied upon his local knowledge in judging at which places in the channel there would be sufficient depth of water for the *Towerfield* to navigate safely to the northward of that line. His estimate was that at high water on that tide if he was within 40 ft. of the bush perch the ship would be afloat, but he intended to pass the perch at a distance of 50 to 60 ft. When the ship took the ground and remained stationery, her port bilge amidships was 40 ft. from the base of the perch.

Why Craig thought it was safe to take the *Towerfield* 40 ft. from the bush perch was not clear and his explanations differed from time to time. In his report to the pilotage authorities six days after the stranding he stated that the vessel grounded on an unknown ridge with her port bilge, and that the grounding could have been avoided if the perch marking the north side of the channel had been placed more towards the edge of the channel. He admitted that, so far as he knew, the perch had always been in the same position. He said that his attention was always on the perch, which he used as a " lead in ". He did not agree that the perch was merely a dredging mark. He also said that he was not aware that the perch was as far as 40 ft. from the edge of the dredged channel and thought it was a bit misleading to have it so far away from the edge. In his deposition before the Receiver of Wreck, he stated that the stranding might have been avoided if the marking perch was placed more towards the channel. At the trial he suggested that the proper thing to do would be " to take the perch off the foreshore and put it on the " river side—remove it about 20 to 25 ft. or so further towards " the channel ". This evidence, if it was accurate, showed that he was ignorant of the actual position of the perch with reference to the edge of the dredged channel. The chart inset shows the bush perch 50 ft. from the north limit of the dredged channel, so that if the chart was relied upon it would clearly be unsafe to take the ship within 40 ft. of it. Even on his own evidence there did not appear to be any justification for Craig's idea that the perch was a navigational mark, indicating with any degree of precision where the edge of the dredged channel was or that he might expect to navigate the *Towerfield* 40, 50 or 60 ft. to the southward of it.

Pritt K.C., *Hayward K.C.*, *Fletcher-Cooke* and *Hene* for the appellant harbour board (the defendants). If the shipowners are to succeed on contract they must establish (a) the existence of the contract alleged, (b) a breach of that contract by the board and (c) that the damage flowed from the breach. They must establish this chain of causation and they cannot do so. In the first place, a contract cannot be inferred from the information given on the Admiralty chart. It would have to be shown that there was an offer made on behalf of the board by the Admiralty and that it was accepted by the shipowners. If the Admiralty itself prepared the map, it cannot have been offered by the board. The inscription said that it included " additions from the ordnance survey ".

Further, an offer made in 1933 is not necessarily operative in 1941. It is true that if one makes such an offer as was made in *Carlill* v. *Carbolic Smoke Ball Co.* (1) one makes it to all the world and that it might be said that here the board should have expressly withdrawn the offer if they intended to do so. But distant ships might never hear of the correction and that would create an anomaly. There is a fundamental unreality in the alleged contract and the facts cannot be analysed into an offer and acceptance. Even assuming that there was a contract, the damage did not flow from any breach of it, for the master acted not in reliance on the chart, but confiding in the skill of an apparently competent pilot. There is nothing to show that even had he been given full information he would have acted differently and accordingly the chain of causation is broken. He was never asked, as he should have been, what he would have done if he had been told the facts.

The pilot was negligent in that he knew of the silting up and should not have relied on the dredging marks. They were merely an indication to the dredger of the channel to be dredged; they could not be relied on to mark the edge of the channel shown on the chart; they might equally well indicate either the top of the bank or the limit of the full depth dredged. The pilot did not use the leading marks and the assessors found that it was not good seamanship to keep so close to the bush perch. The ship could have kept further to starboard and begun to turn to port earlier to deal with the freshet. The effective cause of the stranding was the pilot's negligence. In the circumstances of the case any negligence of the board does not alter that fact. It was the pilot who had the last opportunity of avoiding the accident. Accordingly the shipowners are responsible to the harbour authority.

As to the " last opportunity " rule, the principle to be applied is that stated by Viscount Simon in *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*) (2). The question is: Whose act caused the damage? On that basis *Davies* v. *Mann* (3), like *British Columbia Electric Ry. Co., Ld.* v. *Loach* (4), are still authoritative. In *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*) (2) no doubt was thrown on the correctness of *Davies* v. *Mann* (3) which remains good law. It was merely held inapplicable. It provides some support for the proposition that a defendant may be held negligent, even though he did not in fact see an obstruction, if he should have seen it. *Davies* v. *Mann* (3) is applicable here, for the shipowners, being responsible for the pilot's navigation, could have avoided the result of the board's negligence by careful navigation. In any event the pilot's negligence contributed to the stranding. The negligence of the board consisted partly in having the harbour in a certain condition, partly in not knowing fully what that condition was and still more in not warning others of that condition. That corresponded to the donkey in *Davies* v. *Mann* (3) and despite that negligence a well-informed pilot could have brought the ship safely in. The pilot knew or should have known of this bank, and the board were entitled to assume that he knew the port intimately. He was "subsequently and severably negligent" within *Admiralty Commissioners* v. *Volute* (*Owners*) (5). See also *McLean* v. *Bell* (6); *Swadling* v. *Cooper* (7); *Davies* v. *Swan Motor Co.* (*Swansea*), *Ld.* (8); *Henley* v. *Cameron* (9); *Radley* v. *London & North Western Ry. Co.* (10); *Butterfield* v. *Forrester* (11); articles by Professor A. L. Goodhart and Professor Glanville Williams on the "Last Opportunity" Rule (1949) 65 *Law Quarterly Review*, pp. 237 and 449 (see also p. 318) and an article by Lord Wright on Contributory Negligence (1950) 13 *Modern Law Review*, p. 2. The master must be identified with the pilot. He relied on him and in the evidence there was no attempt to show that fuller information would have made him change his attitude. As to this the court is not entitled to speculate. The master could lawfully have remonstrated with the pilot as to his course: see *The Tactician* (12).

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(1) [1893] 1 Q. B. 256.
(2) [1948] A. C. 140.
(3) (1842) 10 M. & W. 546.
(4) [1916] 1 A. C. 719.

In this case the board were not responsible for inviting the ship to the harbour, for she was directed thither by the Ministry of Transport. Therefore the only duty of the board was to keep the proper officials of the Ministry informed as to the condition of things at the port. But, assuming the shipowners were invitees, their duty and that of their servants and agents was to navigate with care and skill according to the standards of good seamanship: see *Anchor Line* (*Henderson Brothers*), *Ld.* v. *Dundee Harbour Trustees*, *The Circassia* (13). The legal obligations of invitors to invitees are subject to the following limitations: (a) If the invitee knows his way about the invitor does not have to be so particular in making things safe for him as in other cases: see *Norman* v. *Great Western Railway Co.* (14); (b) The obligation to make things safe only covers areas to which the invitee might reasonably be expected to go: see *Mersey Docks and Harbour Board* v. *Procter* (15); (c) The danger must be unexpected, viz.,

(5) [1922] 1 A. C. 129, 136.
(6) (1932) 147 L. T. 262.
(7) [1931] A. C. 1.
(8) [1949] 2 K. B. 291.
(9) (1948) 65 T. L. R. 17.
(10) (1876) 1 App. Cas. 754, 758-9.
(11) (1809) 11 East 60.
(12) [1907] P. 244, 247, 249, 252.
(13) (1922) 38 T. L. R. 299.
(14) [1915] 1 K. B. 584.
(15) [1923] A. C. 253, 260.

not obvious; (d) The invitor does not have to show that the invitee voluntarily undertook the risk; it is enough if he knew of it: see *Lucy* v. *Bawden* (16). Treating the master as identified with the pilot, who had had ample opportunity to view this part of the channel at low tide, the board are not in breach of their obligations. As to the effect of s. 15 of the Pilotage Act, 1913, on its true construction the shipowners are answerable (i.e., responsible) for all purposes for any fault of navigation by the compulsory pilot. It puts the employer of a compulsory pilot in the same position as the employer of a voluntary pilot. On this point the appellant board adopt the reasoning of Bucknill L.J. in this case (17).

As to s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, on its true construction the board are entitled to recover from the shipowners in full, even though they may have been guilty of contributory negligence. It appears to impose an absolute duty on the ship to make good any damage to a harbour, but some limitation on this liability must be imported, and in a case where the damage is brought about solely by the negligence of the harbour board it is conceded that they could not invoke the section. Reading s. 74 in the light of *Great Western Railway Co.* v. *Mostyn* (*Owners*) (18), if the ship has partly caused the damage liability attaches to the shipowners, because the words of the section do not permit of its not attaching. If, however, the negligence which caused the damage were that of the harbour authority then the shipowners could recover against them as damages for negligence the sum paid by them under s. 74. It is the principle of circuity of action which would prevent the harbour authority from recovering in such a case. To say that the harbour board cannot rely on their own wrong is not the correct way of putting the matter because in invoking s. 74 they need not have regard to their negligence; they can sue on the mere fact of damage by the ship: see *Det Forende Dampskibs Selskab* v. *Barry Railway Co.* (19). The type of damage done by this ship is within s. 74, *viz.*, the effect of its presence on the bank on future silting up.

Carpmael K.C., *Naisby K.C.*, and *Boyes* for the respondent shipowners (the plaintiffs). There are concurrent findings of fact in accordance with the evidence that the board were guilty of negligence. Their negligence was the sole cause of the grounding of the ship and the pilot was not negligent, or wanting in reasonable care. There is no evidence to support the finding that he either knew or ought to have known of the obstruction. Further, even if he was negligent the sole cause of the grounding was still the negligence of the board. The cause was not his failure to ascertain the extent of the obstruction. In any event, the shipowners cannot be affected by any negligence on his part before he was in charge of the ship in failing to acquaint himself with the state of the channel. The board were under a continuing duty to warn both the pilot and the shipowners or the master of the *Towerfield* either of the presence of obstructions or of their failure to take reasonable steps to ascertain that the channel was clear and they cannot therefore rely on any negligence on the part of the pilot as amounting to contributory negligence so as to afford them any defence to this claim. The pilot is as much an ordinary user of the port as the master and he is as much entitled to accurate information. The board must either tell the master all the facts or make certain that the pilot knows all the facts and will pass them on. They could, for example, have sent out the information by the examination vessel. They cannot slough off their own responsibility on to the pilot, by saying that they thought he would have known about the obstruction. The ship came to the harbour on the invitation of the board. As to their consequent obligations see *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (20); *The Bearn* (21); *The Moorcock* (22); *Thompson* v. *North Eastern Railway Co.* (23) and *Anchor Line (Henderson Brothers) Ld.* v. *Dundee Harbour Trustees* (24).

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(16) [1914] 2 K. B. 318, 325.

(17) [1949] P. 10, 23 seq.

(18) [1928] A. C. 57.

(19) (1919) 1 Ll. L. Rep. 658.

Further, the board contracted with the shipowners either to keep the channel at the width and depth advertised in the inset to the Admiralty chart and in the West Coast of England Pilot, 1933 and 1941, Supplement, or to warn them that they had not done so. Their failure in this respect debars them from relying on any negligence by the pilot either in tort or contract. There was a breach of the implied warranty that the ship could navigate safely in any part of the dredged channel. See *Bede Steamship Co.* v. *River Wear Commissioners* (25) and *Williams* v. *Swansea Harbour Trustees* (26). See also *Luxor (Eastbourne) Ld.* v. *Cooper* (27). The board offered to receive any ship entering the port on the terms that the channel was safely dredged to the extent shown on the chart and the offer was accepted by the *Towerfield* entering the port. The master, in consultation with the pilot, decided to take the ship in largely on the faith of the information given to ships on behalf of the board. He went in on the faith of the special contract so concluded and he was entitled to its being carried out unless he was given warning that

(20) (1866) L. R. 1 H. L. 93.
(21) [1906] P. 48.
(22) (1889) 14 P. D. 64.
(23) (1860) 30 L. J. (Q. B.) 67.
(24) 38 T. L. R. 299.
(25) [1907] 1 K. B. 310.
(26) (1863) 14 C. B. (N.S.) 845.
(27) [1941] A. C. 108, 137.

he ought not to enter. It was no part of the contract that he should go up the middle of the channel. The obligation of the board was to inform him of the state of the channel before he came in and the opportunity of the pilot to make the mistake he did would not have occurred if the master had been properly informed. Thus their breach of contract was the sole cause of the casualty. Information as to the height of the bank should have been made available to the ship before she entered or the board should have stated that there was a bank which they had not been able to sound for so long, and that accordingly they did not know its exact extent, because it had been increasing. On such information the master would have been imprudent to go up. If told the exact limits of the bank he might have gone up in accordance with that information. In either event he would have acted differently from the way in which he in fact acted. Though there is no evidence how he would have acted, the only inference that can be drawn is that had the information been given the ship would not have been at the place where she stranded. He did not let the pilot navigate the ship unchecked. To avoid immediate peril he would have been entitled to take the navigation out of the pilot's hands: see Marsden on Collisions at Sea (9th ed.), pp. 228–9, and *The Prinses Juliana* (28). See also *The Kurland* (29) and *The Asra* (30).

As to s. 15 of the Pilotage Act, 1913, it covers only claims made against the shipowners and not claims made by him. The effect of s. 633 of the Merchant Shipping Act, 1894, was only to state the position of a shipowner at common law, viz. that he was not to be answerable for the negligence of a compulsory pilot, who was not his servant but whose employment was forced on him by law. The repeal of this section merely deprived shipowners of this defence and did not otherwise affect their rights and liabilities. Henceforth they were to be liable for any loss or damage to other persons caused by negligent navigation of the ship in the hands of a compulsory pilot in a case where negligence was to be imputed to them. On the other hand the section did not prevent them from recovering in respect of any damage which they themselves had suffered. They were to be liable to others because they were "answerable", which presupposed a claim against them. It did not prejudice any claim made by them. There the common law must prevail and the shipowners are not liable for the contributory negligence of a compulsory pilot. In so far as the Act restricts common law rights it must be strictly construed and confined to the ordinary and natural meaning of the words. Compulsory pilotage is still available as

(28) [1936] P. 139, 149.
(29) (1925) 22 Ll. L. Rep. 87.
(30) Ibid. 204.

an answer to a plea of contributory negligence. Thus, despite any negligence on the part of this pilot, the shipowners are entitled to sue the board and s. 15 does not apply to their claim. The authorities do not warrant the conclusions of Bucknill L.J. on this part of the case. This section of the Pilotage Act applies only in tort. The relevant authorities are *The Hector* (31); *Steamship "Beechgrove" Co. Ld.* v. *Aktieselskabet "Fjord" of Kristiania* (32); *The Adam W. Spies* (33); *The Maria* (34); *Carruthers* v. *Sydebotham* (35); *Thom* v. *J. & P. Hutchinson* (36). See also the Maritime Conventions Act, 1911.

As to s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, it does not apply to damage done to a harbour authority's property, if that damage is wholly or partly caused by the negligence of the harbour authority themselves. The section was intended for the encouragement of prudent and not of negligent dock owners. It was intended to promote the building and opening of docks for the use of shipowners. It would be strange if the Act were held not only to protect dockowners where they themselves or their servants were negligent but also to enable them to recover from the ship when their own negligence caused the damage. There must be a qualification to the liability imposed on shipowners by s. 74 to prevent a harbour authority recovering in respect of their own contributory negligence. This must include negligent omission such as occurred in this case. Part negligence on the part of the harbour authority is just as much a turpis causa as sole negligence and should not give them a right of action. *Great Western Railway Co.* v. *Mostyn (Owners)* (37) does not conclude the case against the shipowners. The observation of Sargant L.J. in the Court of Appeal (*The Mostyn* (38)) is correct. *River Wear Commissioners* v. *Adamson* (39) qualifies s. 74. If, however, the shipowners are liable at all under s. 74, it is conceded that the amount recoverable is the extra cost of restoring the channel to the condition in which it was before the stranding, having regard to the effect of the presence of the ship on the further silting up while she remained there. In the calculation credit would have to be given for the work which would have been necessary in the ordinary way. The damage recoverable is limited to the physical assets of the harbour authority and does not extend to their business. It does not therefore include the effect on their business of the ship lying across the harbour and blocking it.

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(31) (1883) 8 P. D. 218.

(32) [1916] 1 A. C. 364, 382.

(33) (1901) 70 L. J. (P.) 25, 26.

(34) (1839) 1 W. Rob. 95.

(35) (1815) 4 M. & S. 77.

(36) 1925 S. C. 386.

(37) [1928] A. C. 57, 64, 71, 86–7, 106.

(38) [1927] P. 25, 47.

(39) (1877) 2 App. Cas. 743.

Pritt K.C. in reply. Under s. 74 of the Act of 1847 the harbour authority are entitled to recover not only the cost of the physical damage done but also in respect of its results. As to liability, *River Wear Commissioners* v. *Adamson* (39) and *Great Western Railway Co.* v. *Mostyn* (*Owners*) (40) have laid down certain limitations to s. 74 and there are no others.

As to the alleged failure of the harbour board to give warning of the danger, it is unreal to require them to warn incoming ships of a variety of dangers not shown on the chart. Theoretically they could send out a letter by the pilot. In the case of a floating mine or a sunken ship, which should be the subject of a special warning, this should be done. But the case of a silted up spit is different, for the pilot should know all about it and the board are not bound to send out a letter by him dealing with matters which ought to be within his knowledge.

The board could not use the examination vessel, which is a naval vessel dealing with security, to communicate with the master. In order to succeed the shipowners must establish a duty to give warning, a breach of that duty, and damage flowing from that breach. To prove damage they must show that had a warning been given the master would either have done something he omitted to do or refrained from doing something he did do. This is not established.

Under s. 15 of the Pilotage Act, 1913, a compulsory pilot is to be treated as the shipowners' servant in the same way as a voluntary pilot. Accordingly his negligence is their negligence.

Their Lordships took time for consideration.

June 30. LORD PORTER. My Lords, it is reasonably plain that the pilot placed no reliance on and made no use of the north dredging marks as an aid to his navigation. He says he could not see them because of factory smoke. His course was determined by the distance which he estimated his ship's port side was from the bush perch, and he was content to judge it by this factor. A good deal of discussion took place in all the tribunals which heard the case as to whether the dredging marks should have been relied upon at all, inasmuch as it was said (i) that they were merely an indication to the dredger of the limits to which the channel was to be dredged; (ii) that in any case they did not mark, or at any rate could not be depended upon as marking, a line up to which the channel indicated upon the chart had been dredged; (iii) that they might indicate either the top of the bank lining the channel from which the ground would slope down to a less extended dredged channel, or the actual limit to which the full depth of the dredging extended. I should, I think, myself infer that they were meant to indicate the line up to which the full depth of the channel would extend and that a stranger to the port might be expected so to regard them, but the true conclusion is not of much importance as they played no part in the course actually chosen.

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(39) 2 App. Cas. 743.

(40) [1928] A. C. 57.

It is undisputed that there was a considerable encroachment into the dredged channel alongside the south pier. Various estimates of its extent were made by those who gave evidence at the trial, but it is, I think, enough to record the statement of the harbour master that on October 20 there was only a distance of 81 ft. from the line of the leading marks to the bank which had formed in the southern half of the channel. I am content therefore to accept the view that Craig knew that there was a bank of considerable dimensions on the south shore which justified him in keeping towards the north side of the channel, but that does not mean that he should be excused for taking his ship so far to the northward as he did. The facts established in reference to the north shore were that a bank had been in existence there from the month of February, that at one time it had extended as much as 50 ft. into the channel opposite the bush perch, but that it had been dredged and materially reduced at any rate up to October 8 but, as was corroborated by the stranding of the *Towerfield*, continued to exist, was seen by one of the other two pilots and by the harbour master, and might have been seen by Craig on October 6 or 7 from the shipyard on the south shore, and on October 17 from the north shore, though it then was 2 ft. under water and was not visible from either of the other two points. Craig disputed its visual existence on October 6 and 7, had not visited the north shore on October 17, and said generally that it was formed of silt which a succeeding freshet washed away, but he had made no inspection to see whether it was still there or not.

The necessary conclusion from these findings is that Craig thought that the line of dredging marks was less than 40 ft. from the bush perch, knew there was from time to time an encroachment on the north side of the channel opposite that perch, trusted to its being washed away by the freshet but took no steps to make a close inspection of its constitution or extent from its immediate neighbourhood either on October 6 or 7 or on October 17, and in any case trusted himself to be able to judge his distance from the bush perch by eye alone, though an estimate of distance from a given point is notoriously difficult, more particularly in the case of a moving ship. The fact is that usage had made him over confident. He had no doubt piloted smaller ships up in safety and failed to take sufficient precautions when dealing with a ship of the size of the *Towerfield*.

The question, then, is was his action negligent or a mere error of judgment? It may be said in his favour that he knew and feared the southern encroachment, that the freshet impinged upon and was turned southwards by the north bank so that it tended to push to the southward the bow of a ship proceeding up the channel, that some hugging of the northern shore was therefore justified, and that for some days there had been a considerable freshet which might tend to diminish the northern encroachment, that he was proceeding up the river when the ebb tide was beginning, and that the Supplement to the West Coast Pilot contained the warning that with an ebb tide care is necessary to prevent the freshet catching a vessel on the port bow if the turn into the turning basin is not made early. Nevertheless our assessors say that a safe course, and indeed the only safe course, would have been to follow the line of the leading marks. The assessors in the Court of Appeal on the other hand thought that no course was absolutely safe but that to proceed a little to the north of that line was the best course which he could pursue. Ultimately the matter is one for your Lordships' decision and I should myself be content to accept the view that there was no substantial danger in proceeding up the channel in the conditions obtaining provided a course on, or somewhat but not too far north of, the leading marks was followed. But I do not agree with the contention that so great a divergence as in fact was adopted was permissible, and in particular that so close an approach to the north bank was justified, inasmuch as at least the possible and indeed the probable inference from observed or observable fact was that an encroachment existed and had existed there for a considerable time. Still less excusable in my opinion was the trust which the pilot placed in his power to judge by the eye alone the distance of the bush perch from the line of his approach up the channel.

In this last view your Lordships have the advantage of confirming your impression from an answer given to a question put to our assessors. When asked, "Was it good seamanship for the "pilot to judge his distance from the edge of the dredged channel "by reference solely to the bush perch (*a*) apart from the "conditions obtaining, (*b*) in the conditions obtaining, i.e., a "strong south-west wind and with freshet?" they answered "No!" to both these questions. With these answers I myself agree. So far therefore as the pilot is concerned I suggest to your Lordships that the inset chart, and for that matter the observations and warnings to be found in the West Coast Pilot, are irrelevant in his case. Craig neither made use of nor placed any reliance upon them; he was guided solely by his own experience and prepared even to take a risk. One of his answers in cross-examination may be quoted as exemplifying his willingness to do so. He was asked, "Although you could not see the bank on the morning of the 17th, you knew there was a bank there?" and he replied, "Well, I did not think there was anything like that to "break the ship up."

The learned judge found that he knew there was a shoal at the north bank opposite the bush perch and further that had he availed himself of the opportunity of observing that part of the channel at low water on October 6 and 7 he could not have failed to see that it was unsafe for the navigation of a ship of the *Towerfield's* size, and I agree with Bucknill L.J. that he had evidence on which he could so find. It is not of course suggested that Craig knew that the place over which he was navigating was too shallow; but he did know of an encroachment in that neighbourhood and did not take due care to avoid it.

Having regard to the established facts, the argument presented on behalf of the shipowners that the *Towerfield* should have been able to be navigated anywhere in the dredged channel has little relevance; the pilot, it is true, meant to shape his course within it, but he meant to do so by estimating his distance from the bush perch and not by the dredging marks, and even if he had been guided by the latter he ought not to have taken a line so close to them or failed to allow for the possibility of silting.

I have dealt with this portion of the case at some length because in spite of one's natural sympathy with the pilot I find myself in disagreement with the findings of the majority of the Court of Appeal and of the same opinion as Bucknill L.J. and Willmer J.

The question of the negligence of the harbour authorities presents less difficulty. All four judges who have considered the matter are in agreement upon this point.

No doubt the harbour board's task of keeping the approach dredged to the depth shown on the inset was rendered less easy of accomplishment by war-time conditions and if their only fault had consisted in a failure to do so, I do not think I should find them to blame. It is the failure to warn rather than the failure or inability to act to which exception can be taken. It was suggested on their behalf that a sufficient indication of the dangers to be met with were to be found in the warning contained in the Supplement to the West Coast of England Pilot. Originally that publication had contained the statement that depths of 4½ ft. are maintained in the basin and in the channel in the approach to it, but this assurance is qualified in the Supplement when it says: "less "depth will be found in places; owing to the difficulty of dredging "on the outer bar, depths of about one foot are common there". This phraseology however is to my mind totally inadequate to convey the information that there were banks on each side of the

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channel rising considerably above that height and extending some way into the channel itself. In the circumstances, in my view, a much clearer statement of the condition of the approach should have been given.

But it is said that the harbour authority were not responsible for inviting the *Towerfield* to enter the Port of Workington. In war-time vessels were directed by the Ministry of Transport, through its officials and by them might be directed or diverted to any port; the only duty of the port authorities, therefore, was to keep the official in charge of their district informed of the position of their port, of its capacities and of any dangers to be avoided.

My Lords, I doubt whether the harbour board fulfilled their duty towards entering ships by passing on such information as they had or ought to have had to the Ministry. But, even if they were under no direct obligation to the ship herself, I am of opinion that they did not comply even with the lesser duty which they accept. The Ministry's official in charge of the Port of Workington was a Mr. Motley. His headquarters were, I think, in London, but he was in constant communication, mostly by telephone, with the various ports to which his responsibility extended. In the case of Workington he states that he was well posted and that he was pretty definite that if there was any encroachment Mr. Monkhouse, the harbour-master, would have stated it. But it appeared in cross-examination that the information which he received was in the form of figures showing, as he says, the latest height of silt in the fairway and the greatest height of silt where the vessel would have to navigate to enter the port. Mr. Motley did not speak of any information which he received except in this general way. He did not particularize the facts transmitted to him and I should not myself regard his evidence as meaning more than that he was told the depth of water which might be expected over the bar and in the channel for a vessel keeping substantially on the line of the leading marks, but as making no reference to the serious encroachments which ate into both the north and south sides of the dredged channel. It was on this information that he directed the *Towerfield* to Workington and he may well have been justified in doing so, being ignorant of any peculiar difficulty in entering the port and trusting the harbour authority to ensure that the master was fully informed of the course he would have to follow and the dangers to be avoided. However that may be, any information supplied to him did not, in my opinion, absolve the harbour board from putting the condition of the channel fully before the master of a vessel entering the port so that he might consider the expediency of entering, and the dangers which might necessitate his intervention with the navigation of the ship by the compulsory pilot.

To determine what he would have done had he been fully informed is a speculative inquiry when the event and its consequences are already known, and the inference to be drawn as to his conduct would not, in my view, have been resolved by asking him to give his reactions at the time of the trial of the case. Action on his part would only have been justified in a moment of crisis, nevertheless he might have refused to go in or have refused to allow the vessel to be navigated so far to the north of the channel. But I do not think it can be said that the accident would not have happened but for his ignorance. He was not to blame, but the pilot was and the pilot's fault was at least a cause of the disaster.

The harbour board's negligence, however, was not confined to a failure to warn the shipowners of facts within their knowledge. They also failed to use due diligence to ascertain the facts with which they should have been acquainted. The soundings, as the learned judge has found, were taken in a hasty and slipshod manner, but even so they showed the accretions on the north and south. Moreover, no soundings had been taken since September 22, and no dredgings had been done on the north side after October 9.

Upon these facts the learned judge, as Bucknill L.J. points out, found the harbour authority to blame for failing to maintain the width and depth of the channel advertised (thereby rendering the published information misleading), in failing to ascertain by proper and regular soundings what obstructions existed in the channel and exactly where they were and in failing adequately to warn the users of the port of dangers which the harbour authority knew or ought to have known. To these faults the Lord Justice adds the failure to warn the owners of the ship or their agents (including the pilot Craig) of the lack of sounding after September 22 and of dredging after October 9. In answer to these charges the harbour board rely upon the contention that the pilot was intimately acquainted with the port and that he knew, or at any rate they were entitled to assume that he knew, its exact condition.

I do not think that such an assumption was justified; it was not true in fact and even if he owed a duty to acquaint himself with its shortcomings they, I think, owed a duty to warn any incoming ship, whether that duty is imposed by contract or by invitation. It may well be that it is the duty of a pilot to acquaint himself with all the conditions of a port which are reasonably within his acquirement. In the present case I doubt whether he was able of himself to ascertain all the facts, but even if he was and did not do so I should hold the harbour authority in fault. They knew that on the information which they had supplied a ship of the *Towerfield's* draft might be directed to Workington by

Mr. Motley. They had received notice that she had been so directed, and knew that by the regulations of the port she must be navigated by a compulsory pilot. In these circumstances, in my view, it was their duty to the ship, even if they owed none to the pilot or to Mr. Motley, to see that the pilot which she was compelled to take and the official whose duty it was to direct her to a particular port had full information of the conditions with which she would meet. For these reasons, which but repeat those which influenced the minds of the judge of first instance and the Court of Appeal, I should hold that the harbour authority were guilty of negligence.

The learned judge, however, though he found both parties negligent, nevertheless was of opinion that the disaster was brought about by the fault of the pilot alone and not by that of the harbour authorities. If the harbour authorities had taken steps to ensure that Craig was supplied with the full information at their disposal and had not assumed that he would find out the facts for himself, this result might follow. But they did not do so. Their failure to warn him was always a factor contributing to the loss of the ship and continued to exert its influence until she went ashore. As in the case of *The Eurymedon* (41) and that of *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*) (42), it had not ceased to play its part before the final dénouement. It is no answer to say that the pilot could have inquired and therefore had means of ascertaining what were the actual conditions of the channel. If the only duty owed by the harbour authorities was to the pilot, this fact might afford them some excuse, but, in my opinion, it was for them vis-à-vis the ship to ensure that the compulsory pilot who must be employed was furnished with the requisite information to enable him to bring her in safely. If he had been informed of the northern encroachment he would almost certainly have taken a safer course and the *Towerfield* like the *Ashbury* would have reached the dock in due course.

It follows that in my view both the pilot and the harbour board were negligent. The owners and their master, however, were not implicated, and the question then arises whether they are infected with the wrong-doing of Craig. Here again all the members of both courts who have heard the case are in agreement.

Under the rule of the common law as it stood in October 1941, the owners and the harbour authority would alike have been precluded from recovering if the pilot is to be regarded as the servant or agent of the former. On the other hand, being a compulsory pilot he would not have been so regarded before January 1, 1918. Up to that date under s. 633 of the Merchant

(41) [1938] P. 41.

(42) [1948] A. C. 140.

Shipping Act, 1894, a shipowner was expressly excused from being affected by the fault of a compulsory pilot, but by s. 15, sub-s. 1, of the Pilotage Act, 1913, which came into force on January 1, 1918, it was enacted that :" Notwithstanding any-" thing in any public or local Act, the owner or master of a vessel " navigating under circumstances in which pilotage is compulsory " shall be answerable for any loss or damage caused by the vessel " or by any fault of the navigation of the vessel in the same " manner as he would if pilotage were not compulsory."

On this language it was urged on behalf of the owners that the only effect of the change in the law was that they would be liable for any loss or damage to other persons which was caused by the negligent navigation of their ship in a case where negligence was to be imputed to them, but that on the other hand the provisions of the section did not prevent them from recovering any damage from which they themselves had suffered. They were to be liable to the others because they were answerable to them, but, it was contended, to say that an owner was " answerable " presupposed a claim upon him, and in no way prejudiced a claim by him. A claim upon him he could not resist, but if there was a claim by him, his remedy was not affected. The problem has been dealt with by Bucknill L.J. in a careful and exact consideration of the Act itself and of its predecessors, from which he comes to the conclusion that both parties are affected by the terms of the Act. Scott L.J. with whom Asquith L.J. agreed, reached the same conclusion from his knowledge of the object which the Act was intended to bring about, coupled with the consideration that inasmuch as, in his view, its terms were ambiguous the court was entitled to resolve that ambiguity by referring to the end aimed at.

My Lords, I arrive at the same result, but by a somewhat different method of approach and upon what I believe to be the true construction of the Act itself. The section says that the owner or master shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel. In the present case the damage to the *Towerfield* was undoubtedly caused by faulty navigation, but when the Act says that the owner shall be answerable for that faulty navigation, it has to be determined whether " answerable " means more than that the damage, whether done to or done by his ship, is his responsibility or is confined to damage done by the ship. Either view no doubt is theoretically possible but I do not think that read in its context the use of the word " answerable " would naturally convey the suggestion that, though the shipowner is liable for any damage done by the pilot's fault, yet he can recover his own damage in full. " Answerable ", as I think, simply means responsible, and a shipowner who through a compulsory pilot is responsible for faulty navigation is responsible for damage to his own ship as well as for injury to the property of another. It follows that he neither pays for the damage which has been done to the other nor can recover his own damage from the other who is implicated.

In so far as the shipowners' claim is said to fail by reason of a tortious act on the part of the pilot of the ship, the majority of the Court of Appeal accept this construction of the statute but in their opinion the liability imposed on the shipowner for the negligence of a compulsory pilot has no application to an action in contract, and in this case they have held that inasmuch as the inset chart was issued by the Admiralty at their instigation the harbour board offered to receive any ship entering or intending to enter the port of Workington upon the terms that the channel was safely dredged to the extent indicated on the chart, and that that offer was accepted by the *Towerfield* by entering the port.

My Lords, for the purpose of this decision and without staying to consider its accuracy, I am prepared to accept the suggestion that such a contract was so formed. But I do not find myself able to agree with the contention that the withdrawal of the protection given to ships employing a compulsory pilot affects only cases where a claim in tort is made.

Taking the view which I do, that upon the true construction of the Act a shipowner is after the beginning of 1918 to be responsible for the acts of a compulsory pilot, I do not find myself influenced by a consideration of the history of the negotiations leading to a change in the law. The provisions of the Act, as I think, themselves plainly attribute to shipowners liability for the fault of a compulsory pilot in all cases and I can therefore see no reason for differentiating between contract and tort, more particularly as this appears to have been accepted as the correct view from the time when the Act came into force until the present day.

There remains, however, to be determined the contention put forward by the harbour board that though their negligence may be one of the causes of the disaster, yet they can recover by reason of the terms of s. 74 of the Harbours, Docks and Piers Clauses Act, 1847. Its material words run as follows: "The "owner of every vessel . . . shall be answerable to the under-"takers for any damage done by such vessel . . . or by any "person employed about the same, to the harbour, dock, or pier, " . . . and the master or person having the charge of such vessel " . . . through whose wilful act or negligence any such damage is "done shall also be liable to make good the same . . . provided "always, that nothing herein contained shall extend to impose "any liability for any such damage upon the owner of any vessel "where such vessel shall at the time when such damage is caused "be in charge of a duly licensed pilot, whom such owner or "master is bound by law to employ and put his vessel in charge "of." The section has, my Lords, been considered at least four times and has twice been fully discussed. Had I been left without guidance I should myself have thought that one of two broad constructions might have been adopted, (1) It might have been held that the shipowner was liable as an insurer whenever the damage inflicted on the harbour works was done by his vessel. At the time when the section was enacted and until the Pilotage Act, 1913, came into force the harshness of such a result was mitigated by the fact that the owner was exempted from liability when the vessel was in charge of a compulsory pilot, but the fact that that limitation on his liability has now been withdrawn, cannot affect the construction to be placed upon it. (2) It might have been decided that the Act was procedural and that liability was only imposed in case the navigation of the vessel was in fault. In the first reported case, *Dennis* v. *Tovell* (43), a Divisional Court in deciding a case stated by magistrates entertained no doubt that liability existed though the damage was the result of inevitable accident without any fault of those in charge.

In *River Wear Commissioners* v. *Adamson* (44), however, where the matter was fully discussed, Lord Gordon took the first view and Lord Cairns the second. The other noble Lords agreed with Lord Cairns in holding the shipowner not liable, but with considerable doubt and in the case of the majority, as I think, because that liability only attached where the ship was still in charge of and controlled by some person. This at any rate seems to have been the reasoning upon which the Court of Appeal acted and your Lordships' House approved their judgment.

The next case to reach your Lordships' House was *Great Western Railway Co.* v. *Mostyn (Owners)* (45), but before that case was considered Roche J. (in *Det Forenede Dampskibs Selskab* v. *Barry Railway Co.* (46) followed the decision in the *River Wear* case (44)) in holding a shipowner not absolutely liable, but excused in a case where the damage to the harbour works was in part at least caused by the fault of the harbour authority. As I read the decision in *The Mostyn* (45), however, the majority of their Lordships took the view that the shipowner was responsible for damage done to harbour works whether he was in fault or not, save in a case similar to that decided in the *River Wear* (44) judgment. Accordingly where the ship had been abandoned and was therefore out of the control of its owners, they agreed that no liability attached under the section. But save for that concession they decided in terms, as I think, that the only exception from liability was that afforded to an abandoned ship.

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(43) (1872) L. R. 8 Q. B. 10.
(44) 2 App. Cas. 743.
(45) [1928] A. C. 57.
(46) (1919) 1 Ll. L. Rep. 658.

My Lords, until *The Mostyn* (45) decided the true effect of the wording of the section a profound difference of view as to its construction was to be found amongst those who practised in that branch of the law which is devoted to shipping matters, but that dispute has now been decided on broad lines and, like Lord Dunedin, who, though he was of the other opinion, expressed his satisfaction that a clear rule for future cases had been laid down, I cannot think that fine distinctions should be introduced which would limit the generality of the decision which has been reached.

I would only add that, like those of your Lordships who are of the same opinion, I would limit the damages to those directly caused to the harbour, in which, as the shipowners concede, are to be included the restoration of the channel to the condition in which it was before the stranding of the *Towerfield*, but I would not embrace amongst them any loss of revenue to which the harbour board have been put thereby. Save to this extent I think the claim and counterclaim fail. I would accordingly allow the appeal and dismiss both claim and counterclaim except in so far as direct damage, as indicated above, has been caused by the *Towerfield* to the board's harbour.

Each party should, I think, pay his own costs throughout.

LORD NORMAND. My Lords, the appellants are a statutory body owning Workington harbour to which they invite shipowners to send their ships for loading and unloading on condition of paying harbour rates and dues. The invitees are entitled to assume that the appellants will exercise reasonable care to prevent the peril of damage to ships resorting to the harbour from any unexpected danger of which the appellants knew or ought to have known. The duty of invitees and their servants or agents is to navigate the ship with care and skill in conformity with the standard of good seamanship: *Anchor Line (Henderson Brothers) Ld.* v. *Dundee Harbour Trustees (The Circassia)* (47).

Whether there was a contract between the appellants and the respondents that the *Towerfield* should discharge in the appellants' dock is uncertain. The evidence for it is imprecise and vague and it is difficult to discover how or by what agency privity of contract was established, and impossible to discover what were the terms of the contract, if any, and whether it included any warranty as to the depth and width of the channel, by which vessels entering the harbour approached the dock. Mr. Motley, an official of the Ministry of War Transport, and Mr. Highton,

(45) [1928] A. C. 57.

(47) 38 T. L. R. 299.

the managing trustee of the appellants' board, gave evidence about the arrangements between the board and the Ministry, the charterers of the *Towerfield*. Mr. Motley said that he received daily from the manager of the board, Mr. Monkhouse, a berthing statement showing the vessels in the port, the dates of berthing and the dates when they expected to finish, with a note giving the amount of silt in the fairway of the channel. He appears to be referring to the depth of water at the bar and not to lateral encroachments further up channel which narrowed it without closing it. With that information before him he recommended to the Shipping Diversion Room that the port could accommodate a particular vessel. Mr. Highton said that if the channel was obstructed the appellants advised the Ministry of War Transport and the Foreign Ore Control Department and said: " 'We have " 'this obstruction or this lack of depth; we may not get it " 'away for ten days, fifteen days or three weeks,' and that was " their guide in routeing vessels to Workington ". He undertook to produce any evidence in writing that warning had been given of encroachment at the side of the channel, but nothing was produced. There is nothing material in the statement of Mr. Monkhouse. It is not proved that any communication was made to the owners of the *Towerfield* except a direction from the Ministry to her master to proceed to Workington, and there is no evidence that any warranty about the condition of the channel was given by the appellants to the owners or to any servant or agent of the owners.

The respondents attempted to build up a special contract with a warranty of depth on the inset plan on the Admiralty chart and the West Coast of England Pilot, 1933, and 1941 Supplement, which were on board the *Towerfield* and which the master had studied before he decided to enter the channel. A note on the inset plan stated that " in the approach channel and turning " basin, within the pecked lines, a depth of 4½ feet at chart datum " is maintained by dredging (1933) ". A depth of 4½ feet at chart datum corresponds to 7 feet below low water of spring tides and is the depth of the sill of the dock for which the *Towerfield* was destined. If that depth had been maintained there would have been 31 feet 6 inches of water everywhere in the channel when the *Towerfield* entered it at high water on the morning of October 19, 1941, and, with her draft of 24 feet aft, she would have had more than 7 feet of water under her. The West Coast of England Pilot, 1933, and 1941 Supplement, modified the note on the inset plan. It contained a note that a depth of 4½ feet was " maintained as far as possible by dredging in the turning basin " and the channel in the approach to it; but less depth will be " found in places; owing to the difficulty of dredging on the outer

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"bar, depths of about one foot are common there". The information about the depth in the channel in these publications had been furnished by the appellants for the purpose of publication in them. The uncertain effects of wind, weather, tide and unpredictable casualties are adverse to the idea that Admiralty charts are intended to constitute a standing offer carrying a warranty that ships entering the chartered ports will find the same conditions as those indicated by the symbols or printed directions on the chart. The charts are subject to modifications published in notices to mariners and in official publications, such as the West Coast of England Pilot, and in later prints or editions of the charts themselves, but it is not possible for publication to keep abreast of events, nor for all ships to have on arrival from a foreign port the latest publications. A depth which is maintained by dredging must vary from time to time because dredging may be interrupted by conditions not within the harbour authority's control. The intention and purpose of notices like the notice of depth on the inset plan is to invite vessels of suitable draft to load or discharge in the harbour. There is a representation that the harbour authority is endeavouring, and will endeavour to maintain the indicated depths by dredging and it is no more than a representation without contractual intention or effect. In *Williams* v. *Swansea Harbour Trustees* (48) and *Bede Steamship Co.* v. *River Wear Commissioners* (49), advertisements of the depth of water at a dock sill had been published by the harbour authorities themselves and on their own responsibility. It was held that there was an implied warranty that there was a safe ingress and egress for vessels loaded up to the standard indicated by the advertised depth of the water on the dock sill. Commercial advertisements published by a harbour authority are not in pari casu with official charts and sailing directions, and the present case is not ruled by the cited decisions. I think that there was no contract, but that the appellants, knowing that the masters of ships would be led to expect, from their study of the chart and sailing directions, to find a fairway of about the width and depth indicated, were bound to give warning of dangerous obstructions of which they were or ought to have been aware.

The main question is therefore whether the parties performed the duties incumbent on them as invitor and invitee respectively. Willmer J. held that the respondents had proved a want of reasonable care in three respects: failure to maintain the width and depth of the channel, failure to ascertain by properly carried out and regular soundings what obstructions existed in the channel and exactly where, and failure adequately to warn users of the port of the dangers of which, as harbour authority, they knew or

(48) 14 C. B. (N.S.) 845.

(49) [1907] 1 K. B. 310.

ought to have known. To these three findings of negligence and failure of duty Bucknill L.J. added a fourth, that the appellants failed in their duty to warn the owners of the ship or their agents (including the pilot Craig) that they had taken no proper steps by sounding since September 22 to ascertain what the state of the channel was and what obstructions, if any, were in it, and that the dredgers had not been at work on the north side of the channel since October 9, 1941.

The facts relevant to these findings are not disputable. On October 19, 1941, on the south side of the channel in the neighbourhood of the bush perch a shoal extended about 80 feet into the channel and opposite it on the north side the shoal on which the *Towerfield* came to grief extended about 20 feet into the channel, which was thus reduced to a width of about 155 feet of navigable water. These shoals had long given trouble to the appellants, who had endeavoured to reduce them by dredging. On the south side, south-west winds cause a drift of slag and rubble which sweeps along the coast and round the end of the south pier and is deposited along the southern edge of the channel. On the north side, floods in the river Derwent cause a deposit of silt along the edge of the channel. Since February, 1941, the appellants had known that the shoal on the north side was a serious encroachment, and had from time to time reduced it both in extent and height by dredging. But dredging was, for reasons for which the appellants were not responsible, not regularly carried out, and the dredger was not employed on this shoal between October 9 and October 19. The obligation to remove obstructions is an alternative obligation; the harbour authority must either remove the obstructions or they must take reasonable care to warn the owners of vessels which they invite to the port of any obstructions which are or ought to be known to themselves and which may create an unexpected danger. Soundings were necessary for the purpose of directing the dredgers, and for the purpose of discharging the duty of warning it was necessary that the soundings should be carefully taken so as to determine the height and extent of the obstructions. But the soundings were hurriedly and negligently taken. The means at the disposal of the appellants were poles about 15 or 20 feet long and they could only be used at low spring tides. Yet on frequent occasions, spring tides were allowed to pass without taking soundings. The last soundings before the stranding of the *Towerfield* were taken on September 22, and an opportunity of taking soundings at low water of spring tides on October 6 and 7 was neglected. No sufficient care was taken to fix the position of the soundings or to define the limits of the encroaching shoals. But, such as they were, the soundings showed that in wet weather, when the river was in flood, a considerable increase in the height and area of the shoal on the north side might take place unless dredging was regularly kept up.

The harbour master knew about an hour and a half before she entered that the *Towerfield's* draft was not less than 24 feet. He also knew that no tug would be available to assist in her navigation. Yet he made no attempt to warn her master of the gross obstructions in the fairway. The explanation offered is that he assumed that the pilot knew all that needed to be known about them and that the pilot would inform the master. He was not entitled to make these assumptions and the appellants must be held to have failed to perform the duty owed to the *Towerfield's* owners.

The pilot also is a user of the harbour and the appellants were under a duty to warn him as well as the master of the *Towerfield* against any unexpected dangers affecting the navigation of the channel.

But the pilot was not a stranger to the port and it was his business to make himself familiar with the conditions affecting safe navigation within it. The appellants were not bound to warn him of dangers of which any competent pilot ought to have known, for the measure of the duty to warn of unexpected dangers must depend upon the qualifications and presumable knowledge of the person to whom the duty is owed. But there is one respect in which I think it is proved that the appellants failed in their duty to the pilot. It is not enough that a pilot should know of the existence of obstructing banks. He should know as accurately as is reasonably possible the limits of the navigable water in the channel. That knowledge was not available to him because the appellants, as has been shown, neglected their duty. The neglect can be brought to a precise date, for the learned judge has held that there was no reason why soundings were not taken on October 6 and 7. I agree with the finding and my conclusion is that there was here a breach of the duty owed to the pilot in failing to make available to him records of reasonably accurate soundings taken at the latest practicable date.

Next, did the pilot perform his duty of navigating the *Towerfield* with care and skill as a good seaman would? He was not misled by the inset plan on the Admiralty chart, and he relied on his own knowledge of the harbour and the channel and on his experience and skill. He entered the channel on the north side of the line of the leading marks at slackwater of high tide. His speed was 2½ to 3 knots. His intention was to pass the bush perch at a judged distance of 55 or 60 feet from the port side of the ship, and he says that he believed he could pass with safety at a distance of 40 feet from the perch. He meant to turn to port at a short distance up channel from the perch. He says that he had often come up in this way, hugging the perch. The reason which he gives is that if the vessel were further to the southward the freshet from the river would tend to force her bow to starboard and to carry her towards the shoal to the south.

When the *Towerfield* took the ground her port bilge keel was 40 feet from the perch and was only 4 feet south of the line of the dredging marks, which approximately indicates the northern limit of the channel. Craig professed less knowledge of the conditions of this small harbour than I think he must have had, but at least he knew that there was a shoal on the north side of the channel at the perch, and in one of his answers in cross-examination he said, " Well, I did not think there was anything " like that to break the ship up ". The nautical assessors have advised us that it was not good seamanship for the pilot to trust to his ability to judge his distance from the edge of the channel solely by reference to the bush perch, and to take the ship as close as 40 feet from it, if he knew of the tendency for a bank to form on the north shore. I agree with this advice. The fact that the pilot committed an error of 30 per cent. in judging his distance from the perch demonstrates how imprudent it was to trust to his judgment of distance from it. I think it is probable that he failed to allow for the effect on the ship of a strong south-west wind. The excuse given by him for keeping so close to the northern edge of the channel—that the freshet might have forced the ship to southward—raises a question of seamanship and we are advised that he should have kept to the line of leading marks.

The experience of the pilot who safely brought in the *Ashbury* on a line only 20 feet north of the leading line may not altogether dispose of Craig's alleged fear of the effect of the freshet, because the tide was still making when the *Ashbury* came in and the force of the freshet is greater at slack water. But a third pilot, Tennant, testified that he usually came in slightly to the south of the leading line until he was as far up as the bush perch and that, so long as the ship was on a course 130° true, which is the bearing of the leading line, she would have the freshet ahead till she reached the bush perch and when she passed the bush perch she would have the freshet on her port bow. Craig also attempted to justify his navigation by saying that the harbour master had instructed the pilots to keep to the north, but this part of his evidence was not accepted by the learned judge. He further said that the freshets tended to clear away the north shoal. But if this had sometimes occurred in certain conditions of tide and weather, it is proved that in the period from February to October, 1941, the bank persisted and tended to increase with the freshets. The conclusion to which I have come is that the pilot was at fault, that he ought to have kept to the line of leading marks and that the excuses put

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forward by him for the course which he took are displaced by the evidence.

Willmer J. held that the fault and negligence of the appellants did not contribute to the casualty because a careful and skilful pilot with Craig's knowledge of the harbour and channel could have avoided the accident.

Whether a particular fault or negligence has contributed to the causation of an event is a question of fact, and the answer is in most cases an inference drawn from all the relevant circumstances. The appellants were in breach of a duty which they owed to the shipowners and to the master of the ship as representing them; it was a duty to warn against perils not to be expected by strangers to the port. It is necessary to bear in mind that before the ship entered the area of compulsory pilotage and before the navigation was handed over to the compulsory pilot, a question arose whether it was prudent to enter the channel at all, and that even after the compulsory pilotage area was entered the ship's master was not deprived of all responsibility and of all power to act to prevent damage to his ship. The master is not merely entitled but bound to point out to the compulsory pilot that he may be mistaken in an opinion he has formed (*The Tactician* (50)). He is also entitled, in order to avoid immediate peril, to take the navigation out of the hands of the pilot, but if he does so he must be prepared to show justification (*The Prinses Juliana* (51)). Unfortunately these considerations were not dealt with in the judgment of Willmer J. when he was assessing the part played by the appellants' negligence in bringing about the stranding.

If the master had known about the shoals near the perch which encroached on the channel, the question whether to enter the port would have been much more difficult for him than it seemed on the evidence before him on the morning of October 19. It was said that he ought to have been asked what he would have done if he had been told of the existence and extent of the obstructing shoals. Such a question, though not in my opinion incompetent, would have been of little value to the court. Being a hypothetical question it would not have elicited a fact as imprinted on his memory, but an expression of opinion coloured by the event which has led to this litigation. The court must proceed upon the probabilities; and if the case had been free from the complications brought about by war, the question what the master would have done would have admitted of an easy solution.

The advice which we have received from our assessors is that a skilled master would not have agreed as a good seaman to bring the ship up at all if he had been told of the existence of a bank on the south shore extending about 80 feet into the channel and the existence of a bank on the north shore extending about 20 feet into the channel in the position shown on the plan. I agree with that advice and I consider that the master of the *Towerfield* is entitled to be treated as a skilled master and a good seaman. But the issue is complicated by circumstances not within the realm of seamanship. The master had to weigh the risk of damage to his ship and cargo by mine or torpedo if he stayed outside and he had to bear in mind that delivery of the cargo was urgent and important for the production of munitions. It is not easy to estimate what the master would probably have done. The harbour master, who had fuller knowledge of all the circumstances and whose statement seems honestly made, expressed the opinion that in the conditions of tide and weather he should not have attempted to enter without a tug. It is legitimate to take account of that evidence and of the evidence that there would have been no delay in unloading the *Towerfield's* cargo if she had entered port the next day. The harbour master naturally emphasized the importance of the tide and weather conditions and the absence of a tug, but these in themselves could not, I think, have presented great difficulty to the passage of the ship through an unobstructed deep channel 250 feet wide. It was the existence of the obstructions in combination with the conditions of weather and tide and with the absence of a tug that made the navigation of the channel hazardous. On the whole it is fair to conclude that a prudent master would have refused to go in on the morning of October 19. But I am convinced that if he had consented to go in knowing the position and extent of the obstructions, he would not have allowed his ship to be steered along the northern edge of the channel and close to the bush perch and the *Towerfield* would not have been stranded. I am therefore of opinion that the appellants' breach of the duty of reasonable care which they owed to the owners and the master of the *Towerfield* contributed to the stranding.

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(50) [1907] P. 244.

(51) [1936] P. 139.

The pilot's negligence also contributed. Even with the knowledge which he had, his navigation was negligent and it brought the *Towerfield* to disaster on a bank, the existence of which was known to him, though he did not know how far it encroached into the channel. It is not necessary to decide whether the pilot was negligent in failing to take more accurate observations of this bank at low water, particularly on October 6 and 7. If the appellants had done their duty on these dates, precise information would have been available to him about the then limits of the bank and observations by him would have been unnecessary. The truth is that with the knowledge which he had the pilot's navigation of the ship was negligent, but with the knowledge which ought to have been available to him if the appellants had done their duty, no man in his senses would have brought the ship so close to the bush perch. The appellants' default of duty towards the owners of the *Towerfield* and their default of duty towards the pilot and the pilot's negligence in navigation are so closely interwoven that it is not possible to single out one of them as the real cause of the casualty and all must be held to have contributed.

The respondents have posed a question on the construction of the Pilotage Act, 1913, s. 15, which has not hitherto been decided. The section enacts: " (1) Notwithstanding anything in any public " or local Act, the owner or master of a vessel navigating under " circumstances in which pilotage is compulsory shall be answer" able for any loss or damage caused by the vessel or by any fault " of the navigation of the vessel in the same manner as he would " if pilotage were not compulsory. (2) This section shall not take " effect until January 1, 1918, or such earlier date as His Majesty " may fix by Order in Council, certifying that it is necessary to " bring the section into operation in order to enable His Majesty " to comply with an international convention. (3) As from the " date of the coming into operation of this section, s. 633 of the " Merchant Shipping Act, 1894, shall cease to have effect."

The respondents admit that a shipowner is " answerable " in a claim against him by a harbour authority for damage caused by the negligence of a compulsory pilot in navigating the ship, but they deny that s. 15 applies in a claim by a shipowner against a harbour authority. In that claim they say that the common law prevails and that the shipowner is not " answerable " for the contributory negligence of a compulsory pilot.

Article 5 of the International Convention for the Unification of Certain Rules of Law in Regard to Collisions, which was signed at Brussels in 1910, provided that " The liability imposed by the " preceding Articles attaches in cases where the collision is caused " by the fault of a pilot, even when the pilot is carried by com" pulsion of law ". Although the Maritime Conventions Act, 1911, amended the law so as to bring into operation the rules for division of loss in collisions and some other changes of the law agreed on at Brussels, it did not abolish the defence of compulsory pilotage. That was not done till s. 15 of the Pilotage Act came into operation on January 1, 1918. But s 15 is not limited in its scope to collision actions, and s. 633 of the Merchant Shipping Act, 1894, which, under sub-s. 3 of s. 15, ceased to have effect on January 1, 1918, was also a section of general scope and not limited to collision actions. Section 633 enacted that " An owner or master " of a ship shall not be answerable to any person whatever for any " loss or damage occasioned by the fault or incapacity of any " qualified pilot acting in charge of that ship within any district " where the employment of a qualified pilot is compulsory by " law ".

The wording of s. 15 is not happy. The word "answerable" is not the cause of the difficulty, and it is merely the equivalent of "responsible". But the words "answerable for any loss or "damage caused by the vessel", though apt when the claim is against the owner of a ship, are incapable of applying when the claim is by the owner for damage done to his ship. The words "answerable for any loss or damage caused . . . by any fault of "the navigation of the vessel" are ill chosen and clumsy, but they are capable of applying to the shipowner's claim. No logical reason was put forward by the respondents for a construction which leaves compulsory pilotage still available as an answer to the plea of contributory negligence, and in collision actions since 1918 the compulsory pilot has been treated in all questions of fault as if he were the servant of the owners of the vessel under his charge. In *Thom* v. *J. & P. Hutchison Ld.* (52) the representatives of a ship's engineer who was drowned in consequence of negligent navigation by a pilot within a compulsory pilotage area claimed damages from the owners. The owners pleaded, inter alia, that the engineer and the compulsory pilot were fellow-servants. The First Division of the Court of Session dismissed the action as irrelevant. Lord President Clyde founded his judgment on s. 15 and he held that it created the relation of master and servant between the shipowner and the pilot, "with all the legal qualifications attaching to it". Lord Cullen said (53) that the effect of the section "is that the liability of the owner is to be same as "if the pilot on board had been voluntarily employed", and that "the compulsory pilot is to be regarded under this enactment as "the servant of the owner". I respectfully agree with the decision and with the reasoning of these learned judges. The judgment of Jeune P. in *The Adam W. Spies* (54), construing s. 633 of the Merchant Shipping Act, 1894, also supports the view that the words "answerable for damage caused by the fault" of a compulsory pilot are broad enough to cover both a defence to an action brought against the ship and an answer to a defence of contributory negligence. I therefore respectfully agree with the judgment of Bucknill L.J. on this question and I am unable to take the view which commended itself to Scott and Asquith L.JJ., that s. 15 of the Pilotage Act, 1913, does not apply when a shipowner is suing or being sued in contract.

The appellants' claim, as founded on s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, remains for consideration. The material words of this section are: "The owner of every "vessel . . . shall be answerable to the undertakers for any "damage done by such vessel . . . or by any person employed

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(52) 1925 S. C. 386.
(53) Ibid. 393.
(54) (1901) 70 L. J. (P.) 25.

"about the same, to the harbour, dock, or pier, or the quays or "works connected therewith, and the master or person having the "charge of such vessel . . . through whose wilful act or negligence "any such damage is done shall also be liable to make good the "same . . . Provided always, that nothing herein contained shall "extend to impose any liability for any such damage upon the "owner of any vessel where such vessel shall at the time when "such damage is caused be in charge of a duly licensed pilot, "whom such owner or master is bound by law to employ and "put his vessel in charge of". The proviso has been impliedly revoked by s. 15, sub-s. 1, of the Pilotage Act, 1913. Section 76, inter alia, gives a remedy over to the owner who has had to make satisfaction for any such damage wilfully or negligently done by the master or person in charge.

Section 74 was considered by this House in *River Wear Commissioners* v. *Adamson* (55). The decision was that the commissioners were not entitled to recover the cost of damage done to a pier when a wreck from which the crew had been removed was driven against it by the wind. The speeches of the noble and learned Lords who decided the case left considerable doubt both about the ratio of the decision and about the construction of the section.

In *Great Western Railway Co.* v. *Mostyn* (*Owners*) (56) this House had again to construe the section and to consider the speeches delivered in *Adamson's* case (55). The House was not unanimous, but the majority held that the owner of a vessel doing damage, to a harbour, dock or pier is responsible to the undertakers for the damage whether occasioned by negligence or not, and explained that in *Adamson's* case (55), the ground of decision was that the section did not extend to damage by a derelict ship which was no longer under the control of any human agency. Viscount Haldane said (57): "The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the "undertaking. My Lords, if the language of this section could "legitimately be construed by us who sit here without regard "to authority, I should find difficulty in saying that the appellants "were not entitled to claim that it applied . . . But we cannot "proceed here on this simple view. It has been established by a "decision which is binding on us by this House that the language "must be interpreted as subject to some qualification which is "implicit in the words, and the question which alone we are free "and bound to examine, is what this qualification is, and how "far it extends". Towards the end of his speech he stated the qualification thus (58): "We appear to me to be bound by the

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(55) 2 App. Cas. 743.
(56) [1928] A. C. 57.
(57) Ibid. 63.
(58) Ibid. 71–2.

" authority of the *Adamson* case (55) to hold that the section in " question is not to be read literally, but as applying when the " damage complained of has been brought about by a vessel under " the direction of the owner or his agents, whether negligent or " not. The decision further exempts the owner when the vessel " is not under such control but is for instance derelict." Lord Shaw said (59): " I must in duty declare that this statute seems " to me still to abide in its full and comprehensive application of " liability to owners, but that in deference to *Adamson* (55), the " exception, plus the statutory exception of pilotage, is the derelict " or abandoned ship case. Respect must be had alike (1) to the " statute in its express and general effect and (2) to the decision " of this House of an implied and particular exception. Such an " exception ought not to be extended or expanded. This House " and courts of law should resist that ". Lord Blanesburgh said (60): " The result, in my view, is that the owner of a vessel " has, under this section, been made answerable to the under-" takers for the damage referred to in the section, with no " obligation on the part of the undertakers to prove more against " him than that the damage was done by his vessel and that he " was her owner at the time. To such a claim when so far " proved only two defences are open to the owner: (*a*) the pilotage " exception; (*b*) that the damage was in fact attributable to the " agency of what, in the language of a simpler age, is known to " the law as an act of God ". My Lords, it may be that the description " act of God " was used in this last sentence with less than Lord Blanesburgh's usual accuracy. But it is sufficiently clear that the majority of the House were laying down as a matter of general construction, that the section imposed upon the shipowner a statutory obligation from which he can only escape, since the Pilotage Act, 1913, came into effect, by bringing himself within the decision of *Adamson's* case (55). Lord Dunedin ended his speech by saying (61): " Although I am not in agreement with " the majority of your Lordships . . . I am glad that there will " at least be a clear rule for future cases—namely, that the action " which led to the damage must be action attributable to human " agency, but, that being found, that the words of the section " remain absolute ". Lord Dunedin's view that the judgment of the House had finally cleared away all doubt about the meaning of the section by construing it as imposing an absolute liability, subject only to the restriction created by the decision in *Adamson's* case (55), is the more significant because he was dissenting.

There is no room left for a construction which would introduce

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(59) [1928] A. C. 57, 87.
(60) Ibid. 106.
(61) Ibid. 77.

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a new exception. It cannot be said that the House may have overlooked the case in which the cause of the damage done by the ship was the negligence of the harbour authority or its servants, for a case was cited in which the authority's claim under this section had been held to fail on that very ground (*Det Forenede Dampskibs Selskab* v. *Barry Railway Co.* (62)). That case had moreover been referred to with approval by Sargant L.J. in the Court of Appeal (63). Lord Haldane certainly had in mind the case where the damage had been caused by the negligence of the harbour authority, for he mentions (64) the opinion which Jessel M.R. had expressed upon it in *Adamson's* case (65). The ratio on which Roche J. decided *Det Forenede Dampskibs Selskab* v. *Barry Railway Co.* (62), that nobody can take advantage or avail himself of the wrong for which he is himself responsible, is not consistent with the judgment of this House in *The Mostyn* (66), which forbids a construction of s. 74 which would qualify its terms by exceptions imported from the common law. But if the shipowner might have recovered as damages in an action of negligence the sum paid by him to the harbour authority under s. 74, a supposition which need not be considered here, the decision would be saved: "frustra "petis quod mox es restiturus".

It follows that the respondents are liable for any damage done to the harbour by the *Towerfield.* The *Towerfield* when she took the ground caused a depression to form in the obstructing bank, she blocked the channel and silt was deposited round her hull. I should have been prepared to say that no damage was done to the harbour within the meaning of this section. "Damage to the "harbour, dock, or pier, or the quays or works connected there-"with" means, in my opinion, physical damage to the opera manufacta of the undertaking. The respondents have however conceded that the appellants are entitled to the extra expense necessary to restore the channel to the condition in which it was before the *Towerfield* stranded, but not to damages for loss of the use of the harbour while the channel was blocked. I would allow what was expressly conceded and no more.

For these reasons I agree that the appeal should be disposed of in the way proposed by my noble and learned friend on the woolsack.

LORD OAKSEY. My Lords, I agree with the judgment of the Court of Appeal, though for somewhat different reasons.

It has not been suggested by anyone that the respondents were themselves in any way negligent or to blame for the stranding of the *Towerfield*, but it is argued that upon the true

(62) 1 Ll. L. Rep. 658.
(63) [1927] P. 25, 47.
(64) [1928] A. C. 57, 64.
(65) (1876) 1 Q. B. D. 546.
(66) [1928] A. C. 57.

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construction of s. 15 of the Pilotage Act, 1913, owners of a vessel are answerable for damage caused by any fault of the navigation of the vessel by a compulsory pilot. On the other hand it is contended for the respondents that the word "answerable" in the section only refers to actions brought against the owners and they are not answerable in the sense that the compulsory pilot's fault disentitles them to sue. My Lords, I agree that the words "answerable for any loss . . . caused . . . by any fault of the "navigation of the vessel in the same manner . . . as if pilotage "were not compulsory" mean that owners of ships with compulsory pilotage are affected by a compulsory pilot's lack of ordinary skill or care in all ordinary cases, but in my opinion this is not such a case, for not only was the pilot's faulty navigation due in part to the appellants' breach of their duty to him but, if the appellants had fulfilled their duty to the respondents, the respondents would have had the opportunity and would, as I find, have taken the opportunity of preventing the stranding by taking the navigation out of the hands of the pilot.

The majority of the Court of Appeal have decided in favour of the respondents on the view that a contract was entered into between the appellants and the respondents by which the appellants warranted that a certain depth would be maintained in their harbour and in the channel thereto unless they notified the shipowners and their pilots that this depth was not maintained and that the appellants had broken their warranty and that therefore even if the pilot's negligence contributed to the accident it had been induced by the failure of the appellants to warn the pilot and in any event did not affect the warranty. I agree with the majority of the Court of Appeal that a contract must be implied between the appellants and the respondents, but the question upon which I am unable to agree with them is the terms which ought to be implied in the circumstances. In my opinion no such warranty can be implied. I entirely agree that the appellants did not fulfil their obligations: they did not carry out proper soundings: they did not take proper steps to ensure that the pilots knew what dredging they had done: they issued a totally misleading plan of the entrance channel: they took no steps to warn the master of the *Towerfield* of the dangers of entering the harbour without a tug in all the circumstances; but on the other hand I do not think they can be held to have warranted any absolute depth in the channel in view of the amendments to the West Coast Pilot stating that the channel was maintained at 4½ feet as far as possible by dredging, and that a less depth would be found in places. I am also of opinion that an obligation must be implied that the ship would be navigated by the compulsory pilot, for whose navigation the owners were answerable, with due care and skill.

Although I consider that the breach of their obligations on the part of the appellants was far more serious than that of the pilot, yet I cannot hold that the pilot navigated the vessel with due care or skill. I sympathize with him in the difficult task which he had to undertake, but in view of his own evidence and the opinions of your Lordships' assessors and of the assessors who assisted the Court of Appeal, I cannot hold that his navigation was a mere error of judgment.

The channel appears to have been about 155 feet wide at the point of stranding and there is no evidence (except perhaps the statement of the harbour master) which suggests that it was not feasible to bring her in either on the leading marks or just north of them. It is difficult to refrain from the conclusion that the pilot must have misjudged his distance from the bush perch and have disregarded the existence of the northern sand bank because of his view that freshets would have washed it away, a view unsupported, I think, by any other evidence.

It has been argued that the principle of *Davies* v. *Mann* (67) is applicable and that the respondent shipowners, being answerable for the pilot's navigation, could have avoided the result of the appellants' negligence by careful navigation and that in any event the pilot's negligence contributed to cause the stranding. This, however, appears to me to be an over-simplification of the position, since the respondents were deprived of the opportunity, which I find they would have taken, of assuming control of the navigation, by the breach of duty on the part of the appellants, that is to say, if the true facts had been communicated by the appellants to the respondents, as they ought to have been, at any time up to the moment of stranding, the respondents could, and as I find would, have avoided the disaster. The harbour master thought, as he said, that the ship should not have come in without a tug but relying upon the pilot, without taking any steps to assure himself that the pilot knew as much as he himself knew, and without himself knowing the facts he ought to have known, he trusted to luck and deprived the respondents of the opportunity of preventing the stranding. In my opinion in such circumstances the true cause of the stranding was the breach of duty of the appellants and to hold that the shipowners are answerable for the pilot's faulty navigation which they would have been entitled to prevent and would have prevented if the appellants had performed their duty seems to me a construction of s. 15 of the Pilotage Act which cannot be justified.

On the appellants' counterclaim I am also of opinion that the judgment of the Court of Appeal was right. It is, in my opinion, a fundamental principle of justice and not merely a rule of the common law, that no one can take advantage of his own wrong (*Coke on Littleton* 148b, *Broom's Maxims* (9th ed.) 197) and this principle is just as much applicable to the construction of statutes as it is to any other branch of law. (See *Davenport* v. *Reg.* (68).) The appellants cannot, therefore, claim for damage to their harbour caused in part by their own failure to fulfil their obligations. It is not in my opinion necessary to depart in any way from what was decided by your Lordships' House in *Great Western Railway Co.* v. *Mostyn* (*Owners*) (69), since the construction there put upon s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, was, that a ship navigated by her master or pilot and crew was liable for any damage which she caused to the harbour works whether by negligence or not, but not that the owners were liable for damage caused or contributed to by the harbour authorities themselves. With the greatest respect to those of your Lordships who take a different view, I think it is scarcely conceivable that your Lordships' House would have laid down such a principle of interpretation without adverting in any way to the fundamental principle that no one can take advantage of his own wrong. The statement of Lord Haldane in *The Mostyn* (70) could not in my opinion have been expressed as it was if Lord Haldane had intended to lay down that a harbour authority could recover for damage caused to their own works by their own acts.

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(67) 10 M. & W. 546.

It is one thing to say that the owners of a vessel may be liable for damage caused by their vessel to harbour works without negligence on the part of the owners or their servants—it is a totally different thing in my opinion to say that if the harbour authority by their own negligence, or the negligence of their servants, damage their own works by driving the vessel against them, they can recover such damages from the owners of the vessel. The previous decision of your Lordships' House in *River Wear Commissioners* v. *Adamson* (71) in not holding the owners liable for their ship when not under human direction, indicates that the damage to which the section refers is not damage done by the ship as an inanimate object. Moreover, if the legislature had intended that harbour authorities should be indemnified for any damage, however caused, to their works, no exception would have been made for the case of compulsory pilotage. The presence of this exception in the section appears to me to indicate that the legislature was considering damage caused by those in charge of the vessel and not damage caused by the harbour authorities or anyone else for whom the shipowners were not fully responsible.

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(68) (1877) 3 App. Cas. 115, 129.

(69) [1928] A. C. 57.

(70) Ibid. 64.

(71) 2 App. Cas. 743.

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It is true that the result is not so startling when the harbour authority's negligence is only a contributory cause of the damage, but the underlying principle appears to me to be the same. If "damage" in the section means damage caused physically by the vessel when human beings are on board of her and nothing more, then even if the damage is entirely due to the negligence of the harbour authority, the harbour authority can still recover. To suggest that the injustice of this result can be obviated by an action by the owners of the vessel against the harbour authority for causing them the damages which they have been compelled to pay to the harbour authority in the action by the harbour authority, offends against the rule to prevent circuity of action and would in my view justify the interpretation which I put upon the section. For these reasons I am of opinion that the appellants' counterclaim should be dismissed.

LORD MORTON OF HENRYTON. My Lords, this is an unusual case in that no fewer than six questions of real difficulty arise for your Lordships' decision. I shall start by stating four of these questions and indicating the answer which I would give to each of them, It will be convenient to refer to the appellants as "the "board" and to the respondents as "the owners".

Q. 1. Was there any negligence on the part of the compulsory pilot who brought in the *Towerfield*? A. Yes.

Q. 2. Was the negligence of the pilot the sole cause or a cause of the stranding of the *Towerfield*? A. It was not the sole cause, but it was *a* cause.

Q. 3. Was the board guilty of a breach of duty which it owed to the owners? A. Yes.

Q. 4. Was that breach of duty a cause of the stranding of the *Towerfield*? A. Yes.

It will be observed that on each of these four questions I have arrived at the same conclusion as Bucknill L.J. and as my reasons correspond closely with his, I can state them quite shortly.

As to question 1, I have felt great doubt whether the pilot could fairly be held to have been negligent, or whether he was merely guilty of an error of judgment, not amounting to negligence in all the circumstances. In the end, however, I see no reason to disturb the finding of Willmer J. (with which Bucknill L.J. concurred) that the former is the correct view. In addition to the matters on which the learned judge and Lord Justice based their judgments, I am influenced by the answers of our assessors, which I accept, to the first two questions put to them.

As to question 2, if the pilot was negligent, I see no reason to doubt that his negligence continued up to the moment of the stranding and was a cause thereof. I shall shortly give my reasons for thinking that there was another cause which contributed to that result.

As to question 3, I think that the board cannot fairly be held liable for failing to keep the channel properly dredged, having regard to war-time difficulties and to the other attendant circumstances. I am, however, of opinion that it was the duty of the board to ascertain by proper and regular soundings the approximate position, shape and extent of the banks which encroached upon the north and south sides of the channel, and to communicate this information to the master of the vessel before he entered the channel, together with the information that the dredger had not been at work on the north bank since October 9. The duty to give this information was one which arose as between invitor and invitee. It may well be that the board was also under certain contractual duties, but for reasons which will appear later, I do not find it necessary to determine whether any contract came into existence between the board and the owners and if so, what were the terms of such contract. The duty just stated was clearly not performed by the board's employees. Apart from the fact that the method of taking soundings was unsatisfactory, the board's employees took no steps to give any information to the master of the *Towerfield*. They were not, in my view, entitled to suppose that the pilot was armed with full knowledge of all the conditions, to rely upon this supposed knowledge, and to leave the master without any information.

As to question 4, it is I think possible that the master would have decided to enter the channel even if he had been properly informed as to the position, shape and extent of the banks on the north and south sides thereof. He would have had to weigh the possible risks of entering against the war risks to which he would be exposed if he remained outside. I feel no doubt, however, that if he had entered the channel he would have intervened to prevent the pilot from taking the course which stranded the vessel. If the master had had the information just mentioned, he would have realized that such a course would land the ship on the north bank, and, however reluctant he might have been to interfere with the pilot, I cannot believe that he would have remained passive in these circumstances. Thus the breach of duty which I have found in answer to question 3 was a breach which continued to have an effect on the navigation of the vessel right up to the moment when she stranded and this breach of duty combined with the negligence of the pilot to cause the stranding. This is, in my judgment, the result of applying to the facts of the present case the principles stated by Lord Birkenhead L.C. in *Admiralty Commissioners* v. *Volute (Owners)* (72). The present case falls exactly

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(72) [1922] 1 A. C. 129, 144.

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within the fourth class described by Greer L.J. in *The Eurymedon* (73) as follows: "But if the negligence of both parties to "the litigation continues right up to the moment of collision, "whether on land or on sea, each party is to blame for the "collision and for the damage which is the result of the continued "negligence of both."

The case is thus one in which each of two parties, the pilot and the board, was guilty of negligence which contributed to the disaster. As it is not alleged that the master or any other employee of the owners was guilty of any negligence, it follows that the owners' claim for damages must succeed, unless it is defeated by s. 15 of the Pilotage Act, 1913, and that the board's counter-claim for damages must fail, unless it is assisted by s. 74 of the Harbours, Docks and Piers Clauses Act, 1847. This leads me to questions 5 and 6, which may be stated as follows:

Q. 5. Does s. 15 of the Pilotage Act, 1913, debar the owners from recovering any damages for negligence against the board, because the pilot of the *Towerfield* was guilty of negligence contributing to the mishap?

Q. 6. Does s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, enable the board to recover any damage to the harbour by the *Towerfield* notwithstanding that the negligence of the board was one of the causes of the stranding of the vessel?

As to question 5, s. 15 of the Act of 1913 has already been read and Bucknill L.J. has given a very full and careful account of the earlier statutes dealing with the position of the owner or master of a ship in charge of a compulsory pilot. He has also reviewed the authorities bearing on this matter.

My Lords, my first impression on reading s. 15 was that it dealt only with cases in which some third party, who has suffered loss or damage caused either (*a*) by the vessel or (*b*) by a fault in the navigation of the vessel, is seeking to recover such loss or damage from the owner or master. The section provides that in such a case the owner or master is to be "answerable" although the vessel was navigating under compulsory pilotage. I still think that this is the most natural meaning of the words used, and I find grave difficulty in reading them as applying also to a case in which the owner or master of a vessel is claiming that a third party is answerable for some loss or damage caused *to* the vessel. However, your Lordships are of opinion that the words do apply to such a case and I can see no logical reason why the legislature should have limited the application of the section to cases in which the owner or master was defendant. Accordingly I shall not dissent from the view which your Lordships have formed in common with Bucknill L.J. and (so far as actions in tort are concerned) with Scott and Asquith L.JJ.

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(73) [1938] P. 41, 50.

I agree with your Lordships in thinking that the wording of the section affords no ground for drawing a distinction between actions in tort and actions in contract. For this reason, I have not found it necessary to form a concluded view whether the board has or has not been guilty of a breach of any contract.

As to question 6 I have not formed any view on the question whether damage can be said to be "done by" a vessel to a harbour within the meaning of s. 74 of the Act of 1847, in cases where the sole cause of the damage is negligence on the part of the harbour authority. This point does not arise, on the views which I have expressed in answer to questions 2 and 4 and it was not fully argued in this House, owing to a concession made by Mr. Pritt, at an early stage, on behalf of the board.

I am, however, of opinion that contributory negligence on the part of the harbour authority is no defence to a claim by the harbour authority under the section. This is, I think, the inevitable result of the views expressed by the majority of your Lordships' House in *Great Western Railway Co.* v. *Mostyn (Owners)* (74). I would add, with reference to a passage in the judgment of Bucknill L.J. in the present case, that when Lord Haldane, in *The Mostyn* (75), used the words "It would have "been equally difficult to hold that there was liability if the "damage had been caused by the action of the undertakers "themselves" he was, in my view, summarizing the opinion expressed by Jessel M.R. in the Court of Appeal in *River Wear Commissioners* v. *Adamson* (76), and was not expressing a view which he, Lord Haldane, himself held. Further I do not think that the dictum of Sargant L.J. in *The Mostyn* (77), upon which also Bucknill L.J. relied in the present case, can be reconciled with the views expressed by the majority of this House in *The Mostyn* (74). I have thought it right to add these observations out of respect to the judgment of Bucknill L.J. with which I am in agreement on all points except the point now under discussion.

I agree with the view expressed by my noble and learned friend Lord Normand that the "damage" mentioned in the section means only physical damage to the opera manufacta of the undertaking. If this is so, I think that the damage in the present case is nil, since it could hardly be said that any damage was done to the harbour by the mere fact that the vessel's bottom disturbed a bank of stones and sand or silt which should never have been in the channel at all.

(74) [1928] A. C. 57.
(75) Ibid. 64.
(76) 1 Q. B. D. 546.
(77) [1927] P. 25, 47.

I would allow by way of damages only what was expressly conceded by the respondents.

I agree with the motion proposed by my noble and learned friend on the woolsack.

Lord Radcliffe. My Lords, I, too, think that neither party should recover on its claim for negligence. Having regard to what he must have known, I can see no way of describing the pilot's navigation of this vessel as other than negligent, and think that s. 15 of the Pilotage Act, 1913, must be construed so as to impute his negligence to the owners, even when they appear as plaintiffs seeking to recover damages for injury to their vessel. If so, their claim must fail, for their negligence was no inevitable consequence of any breach of duty that can be attributed to the harbour authority. It may be quite true to say that this accident would never have happened but for some such breach, though even that conclusion must depend on speculations as to the probable course of conduct of the master or the pilot upon receiving information which they did not get in circumstances that we can only imperfectly reconstruct: but so much as that might be said by any disappointed defendant who is made to compensate a negligent plaintiff in a case of the type of *Davies* v. *Mann* (78), and I do not think that in principle that consideration can be sufficient to "purge" the plaintiffs' own negligence in the navigation of their vessel.

I have had more difficulty in satisfying myself that the harbour authority committed any breach of duty that can fairly be described as a cause of this accident, for I think that the judgments below have charged them with breaches of duty in matters where no such duty was imposed upon them either by statute or by the common law. But I agree that in the special circumstances of this case, which include the nature of the information conveyed by the Admiralty chart and the West Coast of England Pilot as well as the complication inherent in the relationship of master and pilot, there was a duty upon them to give a warning to the master which they failed to give; and that breach is so much connected with the decision that the vessel should dock on the tide upon which she entered and with the course which she followed that it may fairly be regarded as a contributory cause of the accident.

But that conclusion leaves outstanding the appellants' claim under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847. This is the third occasion upon which that section has visited your Lordships' House and it is perhaps unfortunate that so much should still remain to be said about it. Nevertheless the section itself is an important one, since it appears in a general Act that has been widely adopted, and its application involves a question of some moment as to the relationship between a court of law and an Act of Parliament. It is for that reason that I ask leave to deal with the matter at greater length than I should otherwise have thought necessary.

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(78) 10 M. & W. 546.

My Lords, there is no escape from the view that s. 74 is an arbitrary provision. Once it was decided by this House in *Great Western Railway Co.* v. *Mostyn* (*Owners*) (79) that the shipowner's liability under it did not depend on any imputation of default to him or to others who might be in charge of the ship, it was plain that the section was conceived in the interests of the dock or harbour authority and was calculated to produce on occasions what might be very rough justice indeed. But I do not know that I should deduce from that that a court of law would be entitled to give to its language any meaning other than that which the words will fairly admit. It is not always easy to see the whole picture when one is scrutinizing a particular detail of a general code. After all, undertakers of a dock or harbour are providing an important public utility, which the law requires them both to conserve in reasonable condition and to keep open for the service of the shipping public without discrimination. No doubt their enterprise must have its customers. But, if the works of the undertakers get damaged, someone must find the money to restore them to proper condition in the public interest: and I do not think it unfair to recall that it is the shipowner's property that has been the instrument of harm and it is the shipowner's adventure that brings the vessel to the dock or harbour where the damage occurs.

These considerations, however, are not of any determining importance to-day, since any construction which your Lordships place on the words of the section must somehow contrive to be consonant with that placed upon it by our predecessors in the cases of *River Wear Commissioners* v. *Adamson* (80) and *The Mostyn* (79). And those decisions have not left the door very wide open. I do not propose to essay the delicate task of discovering what was the ratio decidendi of the *Adamson* case (80). For all practical purposes the decision in that appeal must be taken with the decision in *The Mostyn* (79) as together providing a single authoritative interpretation of the meaning of the section. I am content with the certainty that in the later case the majority of your Lordships' House did arrive at a conclusion as to what the *Adamson* case (80) had decided and then passed to the, perhaps, smaller achievement of themselves elucidating the construction of the section.

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(79) [1928] A. C. 57.

(80) 2 App. Cas. 743.

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The facts in *The Mostyn* (79) have no particular bearing upon the problem which is now before your Lordships. A vessel had damaged certain installations forming part of Swansea Docks and the damage was done in circumstances that involved no negligence or breach of duty on the part of those in charge of the vessel. The question was whether s. 74 obliged the shipowners none the less to make good to the undertakers the cost of repairing the damage. To answer this problem it was necessary to resolve the long-standing uncertainty as to what the *Adamson* case (80) had really decided. The solution was not arrived at without difficulty: for, whereas Lord Merrivale P. at the trial (81) and the three members of the Court of Appeal (82) thought that the *Adamson* (80) decision was an authority that protected the shipowners, a majority of the members of this House who heard the appeal held not only that it was not such an authority, but also that the shipowners were in fact liable under the section. In expressing their decision they placed a construction on the section. Indeed, how were they to pronounce upon its scope and application without fully considering what construction to give to its words? For my part I cannot entertain any doubt what construction it was that they adopted. If there are ambiguities (and I think that there are) in some of the expressions that they used to define their meaning I think that those ambiguities were the tribute that their piety paid to the somewhat Delphic responses of their predecessors in this House. Such ambiguities as there may be do not matter for our purpose. For the construction that must be taken as authoritatively adopted in *The Mostyn* (79) was that the section imposed an absolute liability on a shipowner whose vessel had done damage to the undertakers' works and that this liability was qualified only (1) by the proviso as to compulsory pilotage, which is not now effective, and (2) by the requirement that the damage must be " attributable to human agency " or not attributable to the " act of God ". This requirement the House regarded as the necessary import of the *Adamson* (80) decision. What matters is that the damage in the case before us cannot possibly be said to be attributable to act of God or not to be attributable to human agency. What is said is that it is wholly or partly attributable to negligent omissions of the harbour authority.

So s. 74 is again before this House. The appellants' harbour has suffered damage and the damage has been done (so it is said) by the respondents' vessel. Your Lordships are invited to read the section as if it contained a qualification to the effect that shipowners are not to be answerable if the harbour authority making the claim can itself be convicted of contributory negligence

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(79) [1928] A. C. 59.

(80) 2 App. Cas. 743.

(81) [1926] P. 46.

(82) [1927] P. 25.

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in the matter of the damage. I think that there are two commanding reasons why the section must not be so read and I do not know which reason to put before the other. Firstly, we are bound by the interpretation which the House placed upon the section in *The Mostyn* (83), and that interpretation leaves no room for a defence of contributory negligence. I might regret that conclusion if I thought that the possibility of a harbour authority causing or contributing to the damage done to its works could have escaped the attention of the noble Lords who formed the majority in *The Mostyn* (83). But the facts do not allow me so to suppose. Such a contingency had been referred to by Jessel M.R. in the *Adamson* case (84) as one of the reasons that justified the introduction of "reasonable" exceptions, and Lord Haldane even referred to that observation in his speech in the House (85), although he expressed no approval of Sir George Jessel's reasoning. Roche J. had decided in *Det Forenede Dampskibs Selskab* v. *Barry Railway Co.* (86) that negligence in the harbour authority did in fact let the shipowners out, and we were informed during the hearing of this appeal that that decision was much canvassed in the arguments of counsel before this House in *The Mostyn* (83). Lastly, Sargant L.J.'s judgment in the Court of Appeal (which was, of course, overruled by the decision of this House) had explicitly referred to and approved of that case (87). It would do altogether too little justice to the reflective powers of Lords Haldane, Shaw and Blanesburgh if I were to suppose that in arriving at their interpretation of the section they had ignored the possibility of a harbour authority contributing to the damage of which it complained.

The second reason is that there is nothing in the wording of the section that would justify us in reading into it such a qualification. If we did we should be amending the section, whereas our function is limited to construing it. To treat it as implied would be to do even more than our predecessors did by their judgments in the *Adamson* case (88), for, whereas they could point to such words as "the master or person having the charge of such vessel" as supporting a construction that limited the range of the section to damage done through human agency, there is nothing that your Lordships can lay hold of that even bears upon the contingency of negligence on the part of the harbour authority.

After all, there are not many words before your Lordships on which the art of interpretation can be employed: "any damage "done by such vessel . . . , or by any person employed about the "same, to the harbour, dock or pier." Where damage done by a vessel under human control is in question it is the vessel itself that is treated by the section as the instrument of causation and it is the damage that it does that has to be paid for. The vessel has not done the damage any the less because those in charge of it may have been acting in compliance with some ill-judged or even careless direction given by a servant of the undertakers or because some omission on the part of the undertakers may have been responsible, or in some measure responsible, for what took place. So to construe the section seems to me to import legal conceptions of responsibility (which is not the same thing as causation) in tort into simple words which, as has already been held in *The Mostyn* (89), are not directed to any considerations of tortious liability.

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(83) [1928] A. C. 59.
(84) 1 Q. B. D. 546, 549.
(85) [1928] A. C. 57, 64.
(86) 1 Ll. L. Rep. 658.
(87) [1927] P. 25, 47.
(88) 2 App. Cas. 743.

My Lords, I cannot part with this case without some reference to the *Barry Railway* case (90). Much as I respect any opinion of Lord Roche, I cannot agree with the reported reasons for his decision. As I have said, I do not think that the section can in any way be construed so as to except damage for which the harbour authority would be held responsible in an action for negligence: and I can see no warrant for applying in the face of the statute the general rule of the common law which may be expressed by saying that a man cannot take advantage of his own wrong. It would be plausible to invoke it in a case where the damage done was solely the result of the claimants' negligence, and I am by no means clear that in such a case a counterclaim in negligence might not ultimately deprive the claimant of all his advantage under the section. Even so, it is not the construction of the section that is different, but other remedies would cancel out its advantage. But, if his negligence is no more than a contributory cause, I cannot see why the provisions of the statute should not govern from first to last. There is certainly no turpitude involved in a failure to observe that standard of care which, after full inquiry, a court of law may find to have been the appropriate measure. Those standards are not absolute: they vary with the parties and the circumstances. Nor are the rules that determine them exactly graven on tables of stone. Indeed the whole significance of contributory negligence at common law has been altered by statute within recent years. Responsibility on the ground of negligence is not evident as a physical fact is evident, although lawyers sometimes speak as if it were, and for my part I cannot at all suppose that the simple statutory remedy afforded by s. 74, which, if damage is under 50*l.*, is to be exigible before two justices, was ever intended by Parliament to be subordinated to a legal trial of what too often proves to be the complicated issue of negligence at common law.

(89) [1928] A. C. 57

(90) 1 Ll. L. Rep. 658.

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The measure of damage was not an issue before your Lordships, and the respondents' counsel informed us that he did not dispute that, if the shipowners could be made liable under s. 74, they ought to pay whatever extra expense had to be met by the harbour authority in returning the harbour to the condition it was in before the ship grounded. So be it. I only wish to make it plain that in my view the section is confined to damage, not damages. I think that it covers no more than the actual physical damage which a vessel may do to the works which constitute the harbour, dock or pier. I do not think that it has any relation to consequential damage: such, for instance, as a loss of business at the dock or harbour attributable to the presence of the stranded vessel or to the physical deterioration of the approach channel.

Appeal allowed.

Solicitors: *Thomas Cooper & Co.; Constant & Constant.*

J. C.*
1950
Oct. 17.

In re MACMANAWAY AND *In re* THE HOUSE OF COMMONS (CLERGY DISQUALIFICATION) ACT, 1801.

House of Commons—Member of Parliament—Priest or deacon ordained by episcopal ordination—Whether disabled from sitting and voting—House of Commons (Clergy Disqualification) Act, 1801 (41 *Geo.* 3, *c.* 63), *ss.* 1, 2, 4—*Observations on interpretation of statutes by reference to later Acts.*

By s. 1 of the House of Commons (Clergy Disqualification) Act, 1801: "Whereas it is expedient to remove doubts which have "arisen respecting the eligibility of persons in holy orders to sit in "the House of Commons, and also to make effectual provision for "excluding them from sitting therein; be it therefore declared and "enacted . . . that no person having been ordained to the office of "priest or deacon, or being a minister of the Church of Scotland, "is or shall be capable of being elected to serve in Parliament as a "member of the House of Commons".

The provisions of the House of Commons (Clergy Disqualification) Act, 1801, so far as they apply to persons ordained to the office of priest or deacon, disable from sitting and voting in the House of Commons all persons ordained to the office of priest or deacon, whether by a bishop of the Church of England in accordance with the form of making and ordaining priests and deacons according to the order of the Church of England, or by other forms of episcopal ordination. Accordingly, a priest who had been elected as a member of Parliament was disabled from sitting and voting by reason of the fact that, having been ordained as a priest according to the use of the Church of Ireland, he had received episcopal ordination.

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* *Present*: LORD SIMONDS, LORD MORTON OF HENRYTON, LORD RADCLIFFE, TUCKER, L.J., and EVERSHED, M.R.

MacManaway, In re, and the House of Commons (Clergy Disqualification) Act, 1801, In re.

Observations on interpreting earlier statutes by deductions drawn from the language of later statutes, or from the presence in them, or absence from them, of some particular provision.

Reference under s. 4 of the Judicial Committee Act, 1833.

By an Order in Council made on July 21, 1950, His Majesty was pleased with the advice of His Privy Council to refer to the Judicial Committee for their hearing and consideration the following question of law, namely: "Whether the provisions of the "House of Commons (Clergy Disqualification) Act, 1801, so far "as they apply to persons ordained to the office of priest or "deacon disable from sitting and voting in the House of Commons "only persons ordained to the office of priest or deacon in the "Church of England as by law established, or whether they also "disable from so sitting and voting other and, if so, what persons "ordained to those offices and, in particular whether, by reason "of the fact that the Reverend James Godfrey MacManaway has "been ordained as a priest according to the use of the Church of "Ireland, he is disabled from sitting and voting in the said House "of Commons".

The Rev. J. G. MacManaway was ordained priest in 1925 by the Bishop of Derry and Raphoe, a diocese in the province of Armagh in the Church of Ireland. At the General Election held in February, 1950, he was elected to serve in the present Parliament as Ulster Unionist member for the division of Belfast (West).

1950. July 25, 26, 27. *Sir Hartley Shawcross, A.-G., C. H. Gage* and *R. J. Parker.* There are two printed cases before the Board, one called the "Case for His Majesty's Attorney-"General", and the other the "Case for the Solicitor for the "Affairs of His Majesty's Treasury"; but those are completely nominal titles, and we are anxious to make it clear that we are not here to make a case, but to address to the Board such arguments as appear to support the view that the Act of 1801 disables from sitting and voting in the House of Commons only persons ordained to the office of priest or deacon in the Church of England as by law established, or, alternatively, all persons episcopally ordained but only if and when they hold office in the Church of England as by law established, and that the Act does not therefore disable the Rev. J. G. MacManaway from sitting and voting in the House of Commons by reason of the fact that he has been ordained a priest according to the use of the Church of Ireland.

There appears to be no direct authority on the precise effect of the Act, and the text-books do not provide significant assistance on its meaning. Subject to certain well-recognized exceptions, all adult commoners are eligible for election to sit and vote in the Commons House of Parliament unless expressly disqualified, and a statute which purports to cut down this right of citizenship is to be strictly construed, especially when, as by s. 2 of the Act of 1801, it is penal in its consequences. It might have been understandable that Parliament might in 1801 have deemed it expedient to disqualify all clergy, of whatever denomination. That was, however, clearly not the intention of the Act of 1801, and it is submitted that it is not easy to see why the disqualification imposed by that Act should have related to clergy who had become such by ordination unless the intention were to limit the exclusion from membership to those clergy who had been regarded historically as an estate of the realm, and whose office was in some sense associated with the State and enabled them to hold livings analogous to offices of profit under the Crown, a view supported by the fact that, by an amendment of the Bill as originally introduced, clergy of the Established but non-episcopal Church of Scotland were expressly included in the disqualification.

There are two obvious constructions of the words "ordained "to the office of priest or deacon" in s. 1 of the Act of 1801. The first is that the section means what it says, and that any priest who was ordained as such, by the laying on of hands, is disqualified. It is not contended that that is the right construction. The other construction is that the section means lawfully ordained according to law, that is, according to the use of the Established Church—the use laid down by the Act of Uniformity, 1662. That simple construction would lead to the view that the disqualification does not apply to the Rev. MacManaway, but only relates to priests of the Established Church. In the alternative, it refers to all persons episcopally ordained, but only if those persons hold office in the Church of England as by law established. In the face of that conflicting interpretation, and assuming that the Board is bound, in considering the reference, by the ordinary canons of construction, it is submitted as a broad proposition that the true meaning of the section is to be found not merely in its words, but by a comparison of the other parts of the law, in earlier or later statutes, which were in pari materia, and also by ascertaining what were the circumstances in reference to which the words were used at the time, and what object those circumstances suggested that the legislature must have had in view at the time—what it was intended to remedy. The argument of counsel in the case reported in Luders on Elections (vol. 2, p. 269, at 271 et seq.) which was heard by a Select Committee of the House of Commons towards the end of the eighteenth century, is adopted as part of our argument.

It is clear from an examination of the circumstances existing at the time when the Act of 1801 was passed that the doubts which that Act was intended to remove related to the eligibility of clergy in holy orders in the Established Church who, having been regarded as an estate of the realm, had before 1662 met in their own Convocation and taxed themselves. It would appear from the report of the Select Committee in Parliamentary History, vol. 35, cols. 1323–1420, that Parliament was then considering the position of the Established Churches only, and that the doubts which had arisen related solely to those churches. In particular (see cols. 1323–43) there was then sitting in the House of Commons as the member for Old Sarum the Rev. J. Horne Tooke, an ordained priest of the Established Church, whose position was the immediate occasion of the Act of 1801. The following persons, being clergy of the Established Church, had been excluded from sitting in the House of Commons on the grounds that they were members of Convocation (see cols. 1344–46), a ground only applying to members of the Established Church: Prebendary Newell in 1553; Mr. Robson in 1621, and Sir James Craddock in 1661. In 1784 one Rushworth, an ordained deacon of the Established Church, had been permitted to take his seat (col. 1348). And lastly in this connexion (see cols. 1375–76) Mr. Chancellor Addington, in addressing the House of Commons on the report of the Committee set up in 1801 to consider the eligibility of clergy (in connexion with the case of Horne Tooke), stated that as a great part of the benefices of the clergy were in the immediate gift of the Crown, the inclusion of the clergy would tend to diminish the independence of the House by increasing the influence of the King and the nobility—a statement which could only apply to the clergy of the Established Church.

Sections 2 and 4 of the Act of 1801 help the construction of s. 1 which is contended for. Section 2, which imposes penalties on disqualified persons who presume to sit and vote, includes amongst these penalties an immediate and continuing incapacity to hold any benefice, living or promotion ecclesiastical, or any office of honour or profit under His Majesty, a penalty which could only be effective or enforceable in relation to the Established Church. Further, if the disqualification applies to any priest, and not only to one of the Established Church, it would appear to have an extraterritorial effect, and, of course, there would be a presumption against that. The provisions of s. 2 indicate that ecclesiastical office was considered to be analogous to an office of profit under the Crown and lend support to the submission that the Act was intended to deal with clergy of the Established Church only. Section 4 provides that proof of celebration of Divine Service according to the rites of the Church of England or of the Church of Scotland shall be prima facie proof of a person having been ordained to the office of priest or deacon or of being a minister of the Church of Scotland. It is submitted that in this context the words "ordained to the office of priest or "deacon" could as thus employed only mean ordained to that office in, or holding preferment in, the Church as by law established. The expression "ordained to the office of priest or "deacon" should be given the same meaning in the other sections of the Act of 1801. "The rites of the Church of England" in s. 4 were the rites of the Established Church, and the scope of the Act was intended to be limited to that Church.

In so far as, if at all, subsequent legislation is sufficiently in pari materia to be any useful guide to the meaning of the Act of 1801, it is consistent with the construction here contended for, rather than the wider construction. First, the express exclusion of persons in holy orders in the Church of Rome by s. 9 of the Roman Catholic Relief Act, 1829, shows that the Act of 1801 was not itself sufficiently wide in its application to exclude such clergy although they are episcopally ordained; s. 9 can only be explained on the view that the Act of 1801 was thought inapplicable to clergy not of the Established Church. Secondly, the provisions of the Clerical Disabilities Act, 1870, which enable a priest or deacon of the Church of England to rid himself of the disabilities imposed by the Act of 1801 by relinquishing his office but not his orders, indicate that the Act of 1801 was dealing with priests and deacons who in fact held office in the Established Church. It was not necessary to make provision to enable ministers of the Church of Scotland to rid themselves of the disabilities imposed by the Act of 1801, for such ministers can, under Scottish law, obtain demission of their status. Thirdly, the Welsh Church Act, 1914, did not disestablish the Welsh Church, but only disestablished the Church of England in so far as it then existed in Wales, and the words "ordained to the office of priest "or deacon" as they appear in s. 2, sub-s. 4, of that Act only refer to persons ordained to those offices in the Church of England as by law established. The provisions of that section as to the position of ordained priests and deacons are necessary transitional provisions.

By s. 2 of the Irish Church Act, 1869, the union between the Churches of England and Ireland was dissolved, and the Church of Ireland was disestablished, and it is submitted that since that Act came into force the Act of 1801 has had no application to ordained priests and deacons in the Church of Ireland or, if it applies to them at all, it does so only when they hold office in the Church of England and thereby become priests or deacons of the Established Church.

The views expressed by Blackstone (Commentaries, vol. 1, p. 175), by Coke (4 Inst., p. 47), and to some extent in the Select Committee's Report in 1800, are all only consistent with the view that it was the ministers of the Established Church who were thought to be ineligible.

Gage following. Section 1 of the Act of 1801 was directed to lawful ordination recognized by the secular law as laid down by the Act of Uniformity, 1662. In 1869 the Church of Ireland was disestablished, and, having become so, and having a prayer-book which was no longer statutory, it was therefore impossible to say that priests of the Church of Ireland were lawfully ordained in accordance with the law of England, and in those circumstances any priest of the Church of Ireland, whether he might be admitted to office in the Church of England or not, was not disqualified because he could not at any time be said to have been lawfully ordained within the meaning of the Act of Uniformity of 1662. If the Board is against that submission, then it is contended that the wording of the Act of 1801 must mean those ordained episcopally and who hold office in the Church of England.

Neville Gray, K.C., *Bing, K.C.* and *Wigglesworth.* The Act of 1801 disables from sitting and voting in the House of Commons not only persons ordained to the office of priest or deacon in the Church of England as by law established, but also all other persons recognized by the law of England as duly ordained to the office of priest or deacon; and in particular disables the Rev. J. G. MacManaway from sitting and voting by reason of the fact that he has been ordained as a priest according to the use of the Church of Ireland.

The question turns principally on the meaning to be given to the expression in the Act of 1801, " ordained to the office of priest or deacon ", which is there used without any qualification. In 1801 the Church of England as by law established and the Church of Ireland as by law established had recently, by the Union with Ireland Act, 1800, been united into one Protestant Episcopal Church, and the Act of 1800 had provided that the doctrine, worship, discipline and government of the united Church should be as the same were then by law established for the Church of England. In these circumstances, it is submitted that the expression " ordained to the office of priest or deacon " when used in the Act of 1801 has to be construed in accordance with the meaning which that expression had in the Church of England. That meaning is made clear in the preface to the ordinal in the Book of Common Prayer annexed to the Act of Uniformity, 1662. That preface confines ordination to the office of priest or deacon to ordination to those offices by a bishop by imposition of hands, but expressly allows ordination by a bishop other than a bishop in the Church of England. And in Phillimore's Ecclesiastical Law of the Church of England, 2nd ed. (1895), vol. 1, at p. 4, it is stated that " the Church of England does not recognize the " validity of holy orders unless conferred by an episcopal hand,

"and does always recognize them when so conferred. Consistently with this theory she does not in practice re-ordain the "clerk who, having been ordained by a Roman bishop, leaves the "Church of Rome and desires to officiate in the Church of "England. Nor can there be any doubt that the Church of "England recognizes the validity of the orders conferred by the "Greek Church". It ought also to be borne in mind that the ordinal in the Book of Common Prayer emphasizes that a person is not ordained or consecrated to an office merely in the Church of England, but to an office in the Church of God.

That the state of the law in and before 1801 is consistent only with the wide construction which, it is submitted, should be given to the words "ordained to the office of priest or deacon" when used in the Act of 1801 is further demonstrated by reference to the following statutes: the Union with Scotland Act, 1706; the Scottish Episcopalians Act, 1711; the Clergy Endowments (Canada) Act, 1791, and the Scottish Episcopalians Relief Act, 1792. In the premises it is submitted that the expression "ordained to the office of priest or deacon" when used in the Act of 1801 included: (*a*) Those who had been ordained to those offices in the Church of England before the Act of 1800; (*b*) those who had been ordained to those offices in the Church of Ireland before the Act of 1800; (*c*) those ordained to those offices in the United Church of England and Ireland constituted by the Act of 1800; (*d*) those ordained to those offices in the Episcopal Church of Scotland; (*e*) those ordained pursuant to the Ordination of Aliens Act, 1784; and (*f*) generally, those ordained to those offices by any bishop, ordination by whom would be recognized as valid in the Church of England. Those classes are within the term "holy orders"; and it is to be remembered that in 1801 the Church was not even the Church of England but the United Church of England and Ireland. In the Act of 1801 two classes of persons are comprehended in the expression "persons "in holy orders", namely, (i) any person "ordained to the office "of priest or deacon", and (ii) any person being a minister of the Church of Scotland.

If the Act of 1801 had been intended to exclude a limited class it would have been easy to say so. Parliament might have thought fit to exclude all ministers of any denomination. It did not do so, and quite clearly did not intend to do so. The Act was not intended to exclude all ministers, but it was intended to exclude all persons who were regarded as being in holy orders, namely, classes (i) and (ii) above. That being so, the Act ought to be interpreted as meaning what it said. The Attorney-General said that the Act of 1801 itself contains provisions which suggest limiting the meaning to ministers ordained in the Established Church. That argument will not stand examination. There is nothing which can be derived from ss. 2 and 4 of the Act, on which reliance was placed, which is sufficient to cut down the perfectly plain words which have been used in s. 1. Neither in s. 4 nor in any other part of the Act is the expression "Established Church" used. References to Acts passed after the Act of 1801 are of doubtful value in construing that Act, but in any event it is quite impossible to find in that legislation—the Roman Catholic Relief Act, 1829; the Clerical Disabilities Act, 1870, and the Welsh Church Act, 1914—anything strong enough to affect the construction of the earlier Act of 1801.

The object of the Act of 1801 is explained by saying that the House of Commons thought that it was not right that a regularly ordained minister should be able to sit in the House of Commons—that the two things were entirely incompatible; and that was what they intended to say, and did say in language sufficiently plain and beyond reasonable doubt. Even if the argument be wrong so far, then, at any rate so far as Mr. MacManaway is concerned and all other priests and deacons in the Church of Ireland, they are still excluded by the Act of 1801, notwithstanding the Irish Church Act of 1869. The true effect of s. 69 of that Act is that all disabilities in relation to the House of Commons to which a priest or deacon of the United Church of England and Ireland was subject continued as existing disabilities of priests and deacons in the Irish Church as well as of priests and deacons in the separate Established Church of England. This interpretation is consistent with the trend of legislation in relation to all ministers of religion in Ireland, who have long since been, and still are, debarred from all elective offices, even in local government.

The Act of 1801, as, indeed, it purports to be on the face of it, is perfectly general and does exactly what it says, and that is to exclude ministers of the Established Church of Scotland, and in England everyone who has been duly ordained either in accordance with the ordinal in the Prayer Book or in a way recognized by the ordinal as an episcopal ordination of any other Church.

Bing, K.C., following, referred to a number of statutes and text-books and said that so far as they went it would seem that the rule was firmly fixed in the minds of people dealing with this matter in 1800 that, so far as Scotland was concerned, all clergymen were excluded, and so far as Ireland was concerned, clergy of the Church of Ireland were excluded. It is reasonable to suppose that in the Act of 1801 the Irish and Scottish disqualification was being extended to the United Kingdom as a whole.

Sir Hartley Shawcross, A.-G., replied.

1950. Oct. 17. The reasons for the report of their Lordships were delivered by Lord Radcliffe. The question which is referred to their Lordships for their advice is a question as to the meaning of certain words which are contained in the House of Commons (Clergy Disqualification) Act, 1801, which Act may be conveniently referred to as "the 1801 Act". The crucial phrase consists of the words "having been ordained to the office of priest "or deacon". The meaning which these words ought to be understood to bear is not to be ascertained by any process akin to speculation. The primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute. But the law recognizes as legitimate certain other aids to a correct interpretation. For instance, the 1801 Act itself recites that it "is expedient to remove doubts which "have arisen respecting the eligibility of persons in holy orders "to sit in the House of Commons", and it is desirable to know, so far as it can be known with any precision, what those doubts were, in case the knowledge should prove to be a help in determining the range of the word "ordained" or, alternatively, of the words "priest or deacon". Again, none of these three words, "ordained", "priest", "deacon", can be said to be truly a term of art in the law of this country, having a fixed and particular connotation, and their significance in the body of the 1801 Act cannot be understood if account is not taken of the general civil and ecclesiastical status as at that date of such persons as might possibly be embraced within the description "persons in holy "orders". Such an account involves consideration of certain then existing Acts of Parliament. There is also a number of Acts of Parliament, later in date than the 1801 Act, to which much attention was directed in the argument before their Lordships. But it is obvious that a subsequent Act of Parliament cannot, generally speaking, afford any useful guide to the meaning of another Act which came into existence before the later one was ever framed. Under special conditions the law does admit a subsequent Act to be resorted to for this purpose. What those conditions are, and whether in this case they sanction a reference to such statutes as the Roman Catholic Relief Act, 1829, or the Colonial Clergy Act, 1874—to name only two of the statutes from which, it was said, there could be drawn reliable, though in the result conflicting, indications as to the intention of those who framed and enacted the 1801 Act—are questions which can most satisfactorily be dealt with at a later stage of their Lordships' opinion.

There is no real difficulty in identifying the general nature of the doubts as to the eligibility of persons in holy orders to which the 1801 Act refers. The occasion of the Act itself was the presence in the House of Commons of the then member for Old Sarum, the Reverend Horne Tooke, a priest ordained according to the order of the Church of England but not at the time holding any ecclesiastical preferment. In 1784 a Mr. Rushworth, who had been ordained deacon according to the order of the Church of England, had been permitted to take his seat; but only after the question of his eligibility had been referred to, and considered by, a Select Committee of the House of Commons. The proceedings and report of this committee had exposed how ambiguous was the position of any person in holy orders, to use for the moment a neutral expression. By ancient constitutional doctrine the clergy of England represented an estate of the realm separate from the Commons: this estate met in the two Provincial Convocations and voted its own taxes. Anyone, therefore, who might be regarded as a member of a Convocation might at the same time be regarded as ineligible to be a member of the Commons. Certainly, Prebendary Newell in 1553 and Mr. Robson in 1621 were excluded from the Commons on this ground, and the weighty authority of Coke and Blackstone was available in support of the theory that it was because a clergyman had, or might have, a voice in Convocation that he could not at the same time have a voice in the Commons.

But by 1801 this ancient doctrine could hardly be regarded as representing a living principle of the Constitution, for since 1664 the clergy had abandoned any practice of voting their own subsidies to the King and had come under the general taxing power of Parliament, indistinguishably from the laity, while no meeting of a Convocation that had discussed more than formal business had taken place since the early years of the eighteenth century. Moreover, since the sixteenth century there was no longer one homogeneous body of clergy for whom Convocation might, even if only theoretically, be the forum; and in 1801 the Parliament of the United Kingdom was faced with the existence of Established Churches for England and Ireland on the one hand, and for Scotland on the other, of the Scottish Episcopalian Church, which, while not established, had yet a tradition of episcopal ordination, and the Roman Catholic Church, whose members might lie under heavy disabilities but whose orders themselves had a validity which no churchman would be likely to challenge.

Another and, perhaps, a wider consideration dwelt upon the nature of the sacred calling itself, and invoked the ecclesiastical rather than the constitutional law. Was it compatible with the spiritual office to which the priest or deacon was irrevocably dedicated that he should devote himself to such mundane activities as were appropriate to a member of the House of Commons? Canon LXXVI, which had been adopted in the year 1603, had laid it down that "no man being admitted deacon or "minister shall voluntarily relinquish the same, nor afterwards "use himself as a layman": and it is a matter of some significance that, when Sir James Craddock was excluded from the Commons in 1661, the ground assigned was not that he had, or might have, a voice in Convocation, the ground assigned in the two previous cases, but that he was in holy orders and "so disabled to sit". This conception, that the ministry of the gospel itself imposed a disqualification for the service of the secular Parliament, appears to have been one that was entertained by the Scottish Parliament before the Union with England, and in the year 1700 that Parliament is recorded to have accepted that a Mr. William Higgins had vacated his seat as Commissioner for the Burgh of Linlithgow "upon his being now an actual minister "of the gospel".

The doubts, then, which the Parliament of the United Kingdom intended to put to rest by the 1801 Act had not been precisely defined. Clearly, they related to the position of persons in holy orders, the phrase used in the long title and in the preamble of the Act, and to the circumstances in which, and the conditions under which, such persons might be eligible for a seat in the Commons. If the case of England alone is considered, the historical instances in which eligibility had been disputed were, indeed, elections of priests or deacons of the Church of England as by law established. But their Lordships are satisfied that there is no material in this account of the origins of the Act that would warrant any particular interpretation, restricted or extended, of the words "ordained to the office of priest or deacon" which appear in the body of the Act. The Act is directed to the position of persons in holy orders, without qualification: it is to provide a common rule for the constituencies of Scotland and Ireland, as well as England; and the form of words used in the first two sections, "be it "declared and enacted", makes it impossible to predicate how much of the substantive provisions was regarded as merely declaratory of existing law and how much was regarded as creating a new legal rule.

Various possible constructions of the words "ordained to the "office of priest or deacon" were suggested to their Lordships. It was said that they ought to be understood to relate only to such persons as had been ordained to those offices in accordance with the form of making and ordaining priests and deacons which is prescribed by the Book of Common Prayer of the Church of England. This construction would mean that the Reverend MacManaway, who was ordained by a bishop of the Church of Ireland according to the use of that Church, was not covered by the Act. Ordination according to the form prescribed by the Book of Common Prayer (and therefore in the manner required to be used in the Church of England by the Act of Uniformity, 1662) was spoken of as "statutory ordination", and it was urged that it would be natural to read words referring to ordination, when used in an Act of the Parliament of the United Kingdom, as referring to ordination in this sense. But their Lordships are unable to accept this argument, for its foundation appears to them to be unsound. "Ordination" is, admittedly, not a word of art: but in 1801 neither the civil law nor the ecclesiastical law sanctioned the view that in this country a man was not to be regarded as an ordained priest or deacon unless he had received "statutory "ordination", or the view that a man who had received episcopal ordination elsewhere was in any sense less completely a holder of the sacred office to which he had been admitted. How this came about can most conveniently be seen by reference to the Restoration settlement.

In 1662 the English Parliament passed the Act of Uniformity. Its main purpose was to make obligatory within any "cathedral "collegiate or parish church or chappell or other place of publique worship within this realm" the use of the revised Book of Common Prayer, for the revision of which Charles II had instituted a Commission on his return in 1660. With the new Book of Common Prayer, which was scheduled to the Act, was combined a revised ordinal for the making, ordaining and consecrating of bishops, priests and deacons. Section 14 of the Act (as originally enacted) introduced this ordinal by the following provision: "No person whatsoever shall . . . be capable to bee admitted to "any parsonage vicarage benefice or other ecclesiastical promotion "or dignity whatsoever nor shall presume to consecrate and "administer the holy sacrament of the Lord's Supper before such "time as he shall be ordained priest according to the forme and "manner in and by the said booke prescribed unlesse he have "formerly beene made priest by episcopall ordination upon pain, "etc. . . .". The preface to the ordinal itself contained a similar injunction: "No man shall be accounted or taken to be a lawful "bishop, priest or deacon in the Church of England, or suffered to "execute any of the said functions, except he be called, tried, "examined, and admitted thereunto, according to the form hereafter following, or hath had formerly episcopal consecration or "ordination".

If the word "formerly" had been taken to refer to nothing more than a date anterior to that on which the Act of Uniformity came into force, thereby providing exemption only for those of the clergy who had been episcopally ordained in no matter what form before the use of the revised ordinal became obligatory, there might be ground for saying that by 1801 there was only one form of lawful ordination that could be recognized in England and Wales. And an Irish Act of Uniformity of 1665 had imposed the same system on Ireland until the Union in 1800: the Union itself had created a United Church of England and Ireland, bound by statute to observe the doctrine, worship, discipline and government as by law established for the Church of England. But the word "formerly" has never been understood in that sense. Ecclesiastical lawyers have consistently treated it as affording statutory sanction for what is both the doctrine and the practice of the English Church, namely, that any ordination that can properly be described as episcopal is a valid admission of a person to the order of priest or deacon and that, once a person has been ordained priest by such an episcopal ordination, whether within or without the Church of England, he is fully qualified to be admitted to any ecclesiastical promotion or dignity in that Church and to consecrate and administer the sacrament of the Lord's Supper.

This principle of the ecclesiastical law is illustrated by the words in which, according to the order of the Church of England, the bishop commits authority to the deacon on admission: "Take "thou authority to execute the office of a deacon in the Church "of God". Similarly, the priest has committed unto him "the "office and work of a priest in the Church of God". The position is summed up in Phillimore's Ecclesiastical Law of the Church of England (2nd ed.), vol. 1, p. 4: "the Church of England does "not recognize the validity of holy orders unless conferred by an "episcopal hand, and does always recognize them when so "conferred. Consistently with this theory she does not in prac"tice reordain the clerk who, having been ordained by a Roman "bishop, leaves the Church of Rome and desires to officiate in the "Church of England. Nor can there be any doubt that the "Church of England recognizes the validity of the orders con"ferred by the Greek Church".

One of the authorities on which Phillimore was drawing for his statements was the Codex Juris Ecclesiastici Anglicani of Bishop Gibson, who in his 2nd edition of 1761 (vol. 1, p. 99) had explained the provisions of s. 14 of the Act of Uniformity, 1662, in the sense which has been set out above. In the light of this, their Lordships are of the opinion that by the year 1801 the phrase "ordained to the office of priest or deacon" had a well-understood meaning, and that there is nothing in the words themselves that would justify the restriction of their scope to persons who had been ordained in precise accordance with the form laid down for the Church of England by the Act of 1662 and by the authority of that Church. If the Act were given that restricted meaning, it would have the curious consequence that a person in the actual enjoyment of ecclesiastical promotion or dignity in the Church of England might yet sit and vote in the House of Commons, provided only that the source of his admission to the priesthood lay outside the Church of England itself.

The same considerations lead their Lordships to reject another argument that was placed before them, to the effect that "ordained to the office of priest or deacon" must mean "ordained "to the office of priest or deacon in a Church by law established". This reading of the words would cover the case of persons ordained by a bishop of the Church of England for work in that Church before the Union with Ireland in 1800, the case of persons ordained by a bishop of the Church of Ireland for work in the Church of Ireland before the same date, and the case of persons ordained by a bishop of the United Church for work in that Church after 1800; but would not extend, it was argued, to the case of any person, such as the Reverend MacManaway, who had been ordained according to the use of the Church of Ireland after that Church became disestablished on January 1, 1871. Alternatively, it was said that the phrase covered only those persons who were ministers of an Established Church, from whatever Church they might derive episcopal ordination.

Their Lordships cannot accept without some reservations the conception that a priest or deacon is ordained in, or into, any particular Church: a conception which, indeed, conflicts with the prevailing doctrine of ecclesiastical law. Such a phrase may conveniently denote the source from which a person derives his status in holy orders, but it is one of the complications inherent in this subject that a person may derive his orders from one Church, even though he ministers in another. However that may be, the Act itself has not spoken of a person ordained to the office of priest or deacon in any particular Church: and that, perhaps, is the shortest answer to this argument. The phrase that the Act has employed contains no necessary implication either that the person struck at has derived his orders from one special Church, so long as he can be described as ordained, or that he ministers in one Church rather than another. Considering that the same sections of the same Act do make specific mention of "any person being a minister of the Church of Scotland", which was the Church by law established in Scotland, it seems impossible to suppose that, if Parliament had intended to exclude only priests or deacons who had some connexion with Established Churches, whether in England or Ireland, it would not have found explicit words which were apt to convey such an intention.

Before leaving this branch of the subject it may be well to state what is the position of the Reverend MacManaway in respect of ordination. That he received episcopal ordination is not in dispute: he was ordained priest in the year 1925 by the Bishop of Derry and Raphoe, a diocese in the province of Armagh in the Church of Ireland. Nor is it in dispute that this ordination would be recognized as validly admitting him to the order of priesthood for the purpose of his holding an English living or other ecclesiastical preferment. It is true that the Church of Ireland has been a disestablished Church since 1871, but in this matter of holy orders disestablishment does not seem to have led to any divergence in doctrine or practice. By the preamble and declaration adopted by the General Convention of the Church of Ireland in 1870 it was resolved that the Church would maintain inviolate the three orders of bishops, priests or presbyters, and deacons in the sacred ministry and would continue to use the forms and orders of the Prayer Book of 1662, subject to such alterations only as might be made therein from time to time by the lawful authority of the Church. Two revisions have taken place, in 1878 and 1926, but the order for the ordination of priests is still in effect the same as that employed by the Church of England and, as in the English form, the priest receives his authority " for the " office and work of a priest in the Church of God ".

It is, of course, permissible to inquire whether there is to be found in other provisions of the 1801 Act some reliable indication that the word " ordained " is being used by the legislature in a sense which is different from that which it would normally bear. Both s. 2 and s. 4 were placed before their Lordships as containing such indication. But, in truth, they are quite inconclusive for this purpose. Section 2 visits upon an ordained person or minister of the Church of Scotland not merely the deprivation of his seat and a monetary penalty in respect of each day that he sits or votes as a member of the House, but also, as a pendent to the monetary penalty, a permanent incapacity of " taking, " holding, or enjoying any benefice, living, or promotion ecclesi" astical, and of taking, holding, or enjoying any office of honour " or profit under His Majesty, His heirs or successors ". The preferments of an established Church alone are denied to the offender, and it was suggested that this itself shows that only the clergy of the Established Church (in whichever of its various senses that phrase may be taken) were the concern of the Act. This, however, is far from being a necessary inference. Parliament was dealing with persons who had, at any rate, so far identified themselves with the life of this country as to get themselves elected to the House of Commons; and, of course, it was not seeking, because it could not seek, to deprive those persons of ecclesiastical or other office in countries outside our own. It disqualified them from two kinds of preferment which enjoyed a special status, ecclesiastical preferment and an office of honour or profit under the Crown: it did not, on the other hand, render them incapable of holding appointments in any religious society whose offices were not included in those terms, or of being in gainful employment in the United Kingdom. No doubt the persons most likely to be affected by the Act were the clergy of the Established Church, and the case of the ordained person elected to the House of Commons who derived his orders from a bishop other than an English or Irish bishop would, in any event, be a rare one. But the fruits of ecclesiastical promotion or of the office of profit under the Crown were available to all. Their Lordships would therefore think it an unsound process to restrict the meaning of the word "ordained" by any deduction to be made from the contents of s. 2.

Nor does s. 4 elucidate the question. Its purpose is to provide a simple method of proving that a person has been ordained to the office of priest or deacon or is a minister of the Church of Scotland within the meaning of the Act, and it does this by enacting that "proof of the celebration of Divine service according to the rites "of the Church of England or of the Church of Scotland, in any "Church or Chapel consecrated or set apart for publick worship, "shall be deemed and taken to be prima facie evidence of the "fact, etc.". A section the purpose of which is procedural, and nothing more, can hardly be a convincing source from which to make deductions as to the interpretation of the Act; but, putting that aside, it is very difficult to say what argument it tends to support. It seems to suggest that the most obvious test of whether a person is an ordained priest or deacon within the meaning of the Act is that he is celebrating Divine service according to the rites of the Church of England. So it would be in many cases, whatever view is taken of the scope of the Act. But such a test has no necessary connexion with the suggested requirement that to be "ordained" a person must have had "statutory ordination" or the other suggested requirement that he must have been ordained "in" an Established Church. It looks rather to a person's active ministry in a Church observing the English rite whatever the source of his orders. And it is really impossible to work out any meaning of the word "ordained" that would confine it to the holding of a living or to active ministry in the Established Church. Indeed, it is possible that the real purpose of the section was to provide a ready method of proof in the exceptional case of a person who, though having identified himself with the life and work of the Church of England, had received his orders elsewhere. However that may be, what matters is that s. 4 cannot be resorted to as giving any clear indication that Parliament had used the word "ordained" in the earlier parts of the Act in any special sense.

Arguments were also addressed to their Lordships which sought to establish the interpretation of the 1801 Act by deductions drawn from the language of later statutes or from the presence in them, or absence from them, of some particular provision. The law does not in all cases reject such aids to interpretation. In *Ormond Investment Co. Ld.* v. *Betts* (1) Lord Buckmaster, after

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(1) [1928] A. C. 143, 156.

J. C.
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MacManaway, *In re*, and the House of Commons (Clergy Disqualification) Act, 1801, *In re.*

quoting a passage from the judgment of Lord Sterndale in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (2), which ran: "I think it is clearly established in *Attorney-General* v. "*Clarkson* (3) that subsequent legislation on the same subject "may be looked to in order to see the proper construction to be "put upon an earlier Act where that earlier Act is ambiguous. "I quite agree that subsequent legislation, if it proceed upon "an erroneous construction of previous legislation, cannot alter "that previous legislation; but if there be any ambiguity in the "earlier legislation then the subsequent legislation may fix the "proper interpretation which is to be put upon the earlier", proceeded as follows: "This is, in my opinion, an accurate expres-"sion of the law, if by 'any ambiguity' is meant a phrase fairly "and equally open to divers meanings . . .".

The conditions under which a later Act may be resorted to for the interpretation of an earlier Act are therefore strict: both must be laws on the same subject, and the part of the earlier Act which it is sought to construe must be "fairly and equally open "to divers meanings". For, indeed, it is a large assumption that the framers of successive Acts of Parliament, sometimes separated from each other in point of time by several human generations, have always approached their subject with a consistent mind or have expressed their purpose with a strict nicety of meaning. Resort to a later Act can rarely, if ever, be justified unless the message that it conveys is a plain one, itself, at least, free from ambiguity. Even the favourite argument as to surplusage may sometimes fall on deaf ears. "It is not a conclusive "argument as to the construction of an earlier Act", said Lord Haldane, L.C., giving the opinion of the Judicial Committee of the Privy Council in *In re Samuel* (4), "to say that unless it be "construed in a particular way a later enactment would be sur-"plusage. The later Act may have been designed, ex abundanti "cautela, to remove possible doubts". When arguments, sometimes of subtle import, are based on inquiring what a later Act might have been expected to contain or to omit if a particular construction of an earlier Act were the correct one, it is well to remember that the one thing which at least is certain amid a good deal that is speculative is that those who framed and enacted the earlier statute, the meaning of which is in question, could by no possibility have foreseen in what terms those who framed and enacted the later statute were destined to express themselves.

These principles, their Lordships think, preclude them from resorting to later Acts to fix the interpretation of the 1801 Act. Firstly, they do not fix it, for nothing emerges from a scrutiny of them that affords a satisfactory guide to what was meant by

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(2) [1921] 2 K. B. 403, 414.
(3) [1900] 1 Q. B. 156.
(4) [1913] A. C. 514, 526.

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"ordained" in the Act in question. Secondly, that Act contains no real ambiguity. The real issue as to the phrase "being "ordained to the office of priest or deacon" is not which of two different meanings, equally open, is to be attributed to it, but whether the historical context of the Act combined with the context of its own provisions requires that the phrase should be interpreted as subject to an implied limitation.

Their Lordships therefore answer the questions of law referred to them as follows. They will humbly advise His Majesty:—

(1) That the provisions of the House of Commons (Clergy Disqualification) Act, 1801, so far as they apply to persons ordained to the office of priest or deacon, do not disable from sitting and voting in the House of Commons only persons ordained to those offices in the Church of England as by law established;

(2) That those provisions disable from so sitting and voting all persons ordained to the office of priest or deacon, whether by a bishop of that Church in accordance with the form of making and ordaining priests and deacons according to the order of the Church of England, or by other forms of episcopal ordination;

(3) That the Reverend James Godfrey MacManaway is disabled from sitting and voting in the House of Commons by reason of the fact that, having been ordained as a priest according to the use of the Church of Ireland, he has received episcopal ordination.

Solicitor: *Treasury Solicitor.*

[PRIVY COUNCIL]

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In re A REFERENCE AS TO THE VALIDITY OF SECTION 5 (*a*) OF THE DAIRY INDUSTRY ACT, R.S.C. 1927, c. 45.

CANADIAN FEDERATION OF AGRICULTURE . . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR QUEBEC AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Canada—Constitutional law—Dairy Industry Act, R. S. C. 1927, *c.* 45, *s.* 5 (*a*)—*Legislative competence—Whether ultra vires Dominion Parliament —In relation to "civil rights" in the province—British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91 (2) (27); *s.* 92 (13); *s.* 95.

By s. 5 (*a*) of the Dairy Industry Act, R. S. C. 1927, c. 45: "No "person shall manufacture, import into Canada, or offer, sell or "have in his possession for sale, any oleomargarine, margarine, "butterine, or other substitute for butter, manufactured wholly or "in part from any fat other than that of milk or cream".

The prohibition of the manufacture, offer, sale, or possession for sale of the goods mentioned in s. 5 (*a*) of the Dairy Industry Act—the object of which was to protect and encourage the dairy industry—was ultra vires the Parliament of Canada, for the prohibition relates to "civil rights in the Province", a subject-matter within the exclusive legislative competence of the Provincial legislatures under head 13 of s. 92 of the British North America Act, 1867.

By that prohibition every citizen of a province is prohibited from manufacturing and selling the named substances, even if he manufactures and sells them only in that province. The "regulation of "trade and commerce", which was assigned to the Dominion legislature by head 2 of s. 91 of the Act of 1867, having been held by the Board in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (the natural-products marketing case) [1937] A. C. 377 not to permit "the regulation of individual forms of "trade or commerce confined to the province", a fortiori, the prohibition of individual forms of trade and commerce confined to the province is not permitted under s. 91 (2). The prohibition in question was typical of those in which the Board had felt bound to put some limit on the scope of the wide words of head 2 of s. 91 "in order", as stated by Duff, J., in *Lawson* v. *Interior Tree Fruit*

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* *Present*: LORD PORTER, LORD SIMONDS, LORD MORTON OF HENRYTON, LORD MACDERMOTT AND LORD RADCLIFFE.

& Vegetable Committee of Direction [1931] S. C. R. (Can.) 357, at p. 366, " to preserve from serious curtailment, if not from virtual " extinction, the degree of autonomy which, as appears from the " scheme of the Act as a whole, the provinces were intended to " possess ".

Secondly, the prohibition in s. 5 (*a*) is in pith and substance a law for the protection and encouragement of the dairy industry in Canada, and the fact that, incidentally, penalties are provided for any breach of the prohibition is not sufficient per se to make the prohibition a law " for the peace, order and good government of Canada in relation to the criminal law " within the meaning of head 27 of s. 91, so as to fall within the exclusive legislative competence of the Dominion Parliament.

Attorney-General for Ontario v. *Reciprocal Insurers* [1924] A. C. 328, 340, applied.

Dictum of Rand, J., in his judgment in the present case [1949] S. C. R. (Can.) at p. 50, approved and adopted.

Thirdly, the prohibition relates to " civil rights " within each of the provinces, which are within exclusive provincial legislative competence under head 13 of s. 92, and there were no facts here which led to the conclusion that there existed conditions which might override the normal distribution of powers in ss. 91 and 92 and justify the prohibition as falling within the " residuary power " conferred on the Dominion by the opening words of s. 91.

Attorney-General for Canada v. *Attorney-General for Ontario* [1937] A. C. 326, 352–3, and *Attorney-General for Ontario* v. *Canada Temperance Federation* [1946] A. C. 193, 205, considered.

Lastly, the prohibition is not within Dominion legislative competence as a law " in relation to agriculture " within s. 95 of the Act of 1867. Although the prohibition might well " produce a " favourable effect on the strength and stability " of the dairy industry, that fact alone, as indicated by the Board in *Attorney-General for Saskatchewan* v. *Attorney-General for Canada* [1949] A. C. 110, at pp. 122–3, is not sufficient to make it legislation " in " relation to agriculture " within s. 95. The connexion between the prohibition and the operations carried on by farmers is too indirect and remote to bring the prohibition within the terms of s. 95.

Lower Mainland Dairy Products Sales Adjustment Committee v. *Crystal Dairy Ld.* [1933] A. C. 168, 173, 174, applied.

Decision of the Supreme Court of Canada [1949] S. C. R. (Can.) 1, affirmed.

APPEAL (No. 30 of 1949), by special leave, from a decision of the Supreme Court of Canada (December 14, 1948) pronounced on a reference by the Governor-General in Council dated July 27, 1948.

The only question referred to the Supreme Court for hearing and consideration was:—" Is s. 5 (*a*) of the Dairy Industry Act, " R.S.C. 1927, c. 45, ultra vires of the Parliament of Canada " either in whole or in part and if so in what particular or par" ticulars and to what extent?" Section 5 (*a*) of the Dairy

Industry Act is in the following terms:—" 5. No person shall— " (a) manufacture, import into Canada, or offer, sell or have " in his possession for sale, any oleomargarine, margarine, " butterine, or other substitute for butter, manufactured wholly " or in part from any fat other than that of milk or cream ".

The judgment of the Supreme Court (Rinfret, C.J., Kerwin, Taschereau, Rand, Kellock, Estey and Locke, JJ.) was expressed as follows:—" (1.) The prohibition of importation of the goods " mentioned in the section is intra vires of Parliament. Locke, J., " finds s. 5 (a) of the Dairy Industry Act to be ultra vires while " expressing no opinion as to the power of Parliament to ban " importation by appropriate legislation. (2.) The prohibition of " manufacture, offer, sale, or possession for sale of the goods " mentioned is ultra vires of Parliament, the Chief Justice and " Kerwin, J., dissenting ".

1950. June 21, 22, 26, 27, 28 and 29. *F. P. Varcoe, K.C.*, *W. R. Jackett, K.C.* (both of the Canadian Bar), and *Gahan* for the Attorney-General for Canada, in support of the appeal. The purpose of this legislation was to give certain protection and encouragement to the dairy industry. Some preliminary matters may be recalled at the outset. First, *Canadian Pacific Wire Co.* v. *Tuley* (1) illustrates how the rules of construction have been applied to ss. 91 and 92 of the British North America Act, 1867. Secondly, the rule has been laid down that a matter not within the legislative competence of the provincial legislatures under s. 92 falls within s. 91: *Russell* v. *Reg.* (2). Similarly, whatever falls within the enumeration of s. 91 is excluded from s. 92. Next, a distinction has been drawn between legislation which is " in relation to " a subject-matter, and legislation which " affects " it: *Gold Seal Ld.* v. *Attorney-General for Alberta* (3). Then, the true nature and character of the legislation in a particular instance must always be determined in order to ascertain the class of subject to which it belongs—that is the pith and substance doctrine. Finally, there is the double-aspect doctrine —that in one aspect and for one purpose the legislation falls within s. 91, and for another purpose in another aspect within s. 92. While, as to the prohibition of manufacture and sale, the legislation now in question may in one aspect fall within the provincial field as being in relation to a local and private matter within the province, it may nevertheless in another aspect fall within the Dominion power under various heads of s. 91.

The first main submission is that s. 5 (a) of the Dairy Industry Act is legislation in relation to " the regulation of trade and

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(1) [1921] 2 A. C. 417, 422.

(2) (1882) 7 App. Cas. 829, 842.

(3) (1921) 62 S. C. R. (Can.) 424, 460.

" commerce " and therefore validly enacted under head 2 of s. 91 of the British North America Act, 1867. Secondly, s. 5 (*a*) and the appropriate penal provision in s. 10 of the Act, is legislation in relation to " the criminal law " under s. 91, head 27, of the Act of 1867. Thirdly, s. 5 (*a*) is a law in relation to a matter not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and is therefore within the residuary power conferred by the opening words of s. 91. In most of the following authorities the three above-mentioned propositions have been considered. All that *Citizens Insurance Company of Canada* v. *Parsons* (4) decided was that the restriction on the regulation of trade and commerce in that case was to the effect that contracts in a particular trade were outside s. 91, head 2. *Russell* v. *Reg.* (2) was a case of the same order as the present, and it was said that the prohibition in that case was not " property and civil rights ". *Hodge* v. *Reg.* (5) was held to be a valid regulative statute, and was the basis of the restrictions which have been placed on the ordinary meaning of " trade and commerce ".

Next, *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (6) shows that if a matter falls within the exclusive legislative power of the province the Dominion has no power to displace that, but that circumstances may arise where the subject has a different aspect, and then the legislative power under peace, order and good government in s. 91 comes to be exercisable by the Dominion. It was held in that case (a) that the Canada Temperance Act was valid under the opening part of s. 91; (b) that it was not valid under s. 91, head 2. *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (7) shows that the prohibition of manufacture and sale in the province by the provincial legislature must be under head 16 of s. 92, that is, by a law in relation to a matter of a merely local or private nature in the province, and not under s. 92, head 13—" property and civil rights ".

Attorney-General for Canada v. *Attorney-General for Alberta* (8) is of the greatest importance in considering this reference; it was relied on by each of the majority judges below on, it is submitted, a misunderstanding of what it decided. There is no comparison between the statute in that case and the present one. It was a purely regulatory statute which fell directly in line with the decision in which it was said that contracts cannot be regulated. Where there is a provision which merely regulates a particular trade it must be conceded that

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(4) (1881) 7 App. Cas. 96, 107, 111.

(5) (1883) 9 App. Cas. 117, 130.

(6) [1896] A. C. 348–371.

(7) [1902] A. C. 73, 78.

(8) [1916] 1 A. C. 588.

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that is now decided against the appellant. But where there is a statute which simply prohibits completely a person doing a certain thing, then the position is not affected by that decision. The fundamental error in the court below here is that they said that a person is free to do this act of manufacturing and selling margarine, and therefore any legislation about it is in relation to "property and civil rights". But every restriction which is placed on the liberty of the subject is not necessarily a matter which is within property and civil rights. This is a protective measure, and the prohibition against manufacture and sale is simply part and parcel of a single scheme; it is identical with the prohibition against importation and should be treated in the same way—as intra vires. This case does not fall within the rule laid down in *Toronto Corporation* v. *Virgo* (9). If this legislation stands it will be open to one province to prohibit the importation of produce from another: see the *Gold Seal* case (10); *Atlantic Smoke Shops Ld.* v. *Conlon* (11). Section 5 (*a*) does not fall within any of the above-cited decisions so as to invalidate it, and there is no justification for a further restriction on s. 91, head 2—for taking another slice out of "trade and commerce"—so as to invalidate it. Somewhere in ss. 91 and 92 there exists this power; it is not in the province, which is limited in s. 92, head 16, to matters of a local and private nature. Further, this statute establishes standards of quality for dairy products, and the regulation of standards of quality has been held to be within the regulation of trade and commerce.

Particular authorities in support of the second proposition—that this is legislation in relation to the criminal law—are *Attorney-General for Ontario* v. *Hamilton Street Railway* (12), *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (13), and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (14). The question in relation to criminal law is whether this statute was a colourable device. A colourable statute is one which says one thing but obviously means something else. There is no colourability here; there is nothing to indicate that Parliament did not genuinely believe in the prohibition; the onus is on those who assert to the contrary.

On the third proposition—that this is a law for the peace, order and good government of Canada in the sense that it is outside of s. 92—s. 5 (*a*) cannot be described as falling within the category of a matter of a merely local or private nature in the province. An example of what quite clearly is not such a matter is the Atomic Energy Control Act, 1946 (10 Geo. 6, c. 37).

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(9) [1896] A. C. 88.
(10) 62 S. C. R. (Can.) 424.
(11) [1943] A. C. 550, 569.
(12) [1903] A. C. 524.
(13) [1931] A. C. 310, 324.
(14) [1937] A. C. 368.

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[Reference in this connexion was also made to *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (15); *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (16); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (17); *Attorney-General for Ontario* v. *Reciprocal Insurers* (18); *Toronto Electric Commrs.* v. *Snider* (19); *Rex* v. *Eastern Terminal Elevator Co.* (20); *Attorney-General for Manitoba* v. *Attorney-General for Canada* (21); *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (22); *In re Insurance Act of Canada* (23); and *Reference re The Natural Products Marketing Act*, 1934, *and its Amending Act*, 1935 (24), which was affirmed on appeal (25).] The type of legislation in the last-cited case was completely different from that now in question. In that legislation the purpose was to regulate transactions according to a system imposed by Parliament. Almost every statute enacted under s. 91 affects "civil "rights in the province". Every criminal law does. Section 5 (*a*) of the present Act undoubtedly affects civil rights in the sense in which that expression has been used throughout the cases, but the submission is that notwithstanding that, it is in relation to one or two heads of s. 91. The question must always be, is it "in relation to" this matter. [Reference was also made to *Attorney-General for British Columbia* v. *Attorney-General for Canada* (26); *Attorney-General for Ontario* v. *Attorney-General for Canada* (27); *Reference re Alberta Statutes* (28); *Shannon* v. *Lower Mainland Dairy Products Board* (29); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (30); and *Attorney-General for Ontario* v. *Canada Temperance Federation* (31).]

Lastly, s. 5 (*a*) is legislation in relation to "agriculture" and therefore validly enacted under s. 95 of the British North America Act. "Agriculture" in the federal field is unrestricted by any context as to distribution of powers under ss. 91 and 92. If Parliament decides that a certain class of agriculture should be provided with a physical market, that would be a proper legislation in relation to agriculture; to secure a market for Canadian producers is a proper legislation in relation to agriculture.

(15) [1896] A. C. 348.
(16) [1902] A. C. 73.
(17) [1924] A. C. 222.
(18) [1924] A. C. 328, 333 et seq.
(19) [1925] A. C. 396, 401, 409.
(20) [1925] S. C. R. (Can.) 434, 457.
(21) [1929] A. C. 260, 268.
(22) [1931] A. C. 310, 323.
(23) [1932] A. C. 41, 46.
(24) [1936] S. C. R. (Can.) 398, 403 et seq.
(25) [1937] A. C. 368, 377.
(26) [1937] A. C. 368, 375.
(27) [1937] A. C. 405, 415.
(28) [1938] S. C. R. (Can.) 100, 120.
(29) [1938] A. C. 708, 718.
(30) [1933] A. C. 168.
(31) [1946] A. C. 193, 203 et seq.

R. H. Milliken, K.C. (Canadian Bar), for the appellant federation. [He reviewed the relevant passages from a number of the above-cited authorities and, in addition, and in support of the proposition that s. 5 (*a*) was validly enacted as legislation in relation to agriculture, referred to the following authorities:— *Attorney-General for Saskatchewan* v. *Attorney-General for Canada* (32); *Rex* v. *Horning* (33); *Brooks* v. *Moore* (34); *Reference re the Validity of s. 6 of the Farm Security Act*, 1944 (*Saskatchewan*) (35).] In the case last cited it was said that there is obviously a difference between legislation " in relation " to " agriculture and legislation which may produce a favourable effect on the strength and stability of that industry. The Dairy Industry Act is a law in support of agriculture; it is guaranteeing to the producer of dairy produce that there will be a reasonable market for his produce in Canada. The marketing arrangements or organization for disposing of the farmer's produce is a proper part of " agriculture ".

L. Emery Beaulieu, K.C. (Canadian Bar), *MacKenna, K.C.*, and *Le Quesne* for the respondent the Attorney-General for Quebec. Section 5 (*a*), in so far as it prohibits the manufacture and sale or having in possession for sale any margarine or other butter substitutes, is legislation relating to " property and civil " rights " and is therefore ultra vires the Dominion of Canada. It is now well settled that the expression " property and civil " rights " has been used in s. 92, head 13, in its widest sense: *Citizens' Insurance Company of Canada* v. *Parsons* (36); *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (37). The words " civil rights " used in their widest sense or meaning include not the mere rights flowing from contract, including commercial contracts, but also what may be called the common-law right of any individual to engage in any profession or occupation of his choice, or to carry on any trade or business that he may select. If the provinces have powers as plenary as the Imperial Parliament within the limits of s. 92, then the legislatures have the power, when dealing with property and civil rights, not only to create new civil rights but also to regulate existing civil rights, or abridge or destroy them, or to prohibit the exercise of any civil right. If that is so, a law which prohibits the manufacture of any produce, including margarine, is prima facie a law relating to property and civil rights; it infringes on the rights of individuals to carry on a trade in the province. [Reference was made to *Attorney-General for*

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(32) [1949] A. C. 110, 122 et seq.

(33) (1904) 8 O. L. R. 215, 219–20.

(34) (1907) 13 B. C. L. R. 91, 94.

(35) [1947] S. C. R. (Can.) 394, 413.

(36) 7 App. Cas. 96.

(37) [1892] A. C. 437, 442.

Ontario v. *Attorney-General for the Dominion* (38); *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (39); and *Shannon* v. *Lower Mainland Dairy Products Board* (40).]

It is not competent for the Federal Parliament under s. 91, head 2, to attempt to regulate a particular trade in one province or in all the provinces together. For the federation it was sought to draw a distinction between a law regulating a particular trade, which would be incompetent under the decisions, and legislation prohibiting a particular trade, and it was suggested that, although Parliament could not possibly regulate such a trade as the present one, it should at least be considered as competent to prohibit it. The decisions which were referred to do not decide purely and simply that Parliament is not competent to regulate a particular trade; they also give the reasons for it, and they are, implied or express, that trade and commerce by itself is a matter of property and civil rights, and that, unless for any reason it can be brought under s. 91, head 2, it falls under s. 92, head 13. If Parliament is incompetent to regulate, it cannot be said to be competent to prohibit, for that is a graver invasion of property and civil rights. [Reference was also made to the *Dominion Insurance* case (41); *In re the Board of Commerce Act*, 1919, *and the Combines and Fair Prices Act*, 1919 (42); *Reference re the Natural Products Marketing Act*, 1934, *and its Amending Act*, 1935 (43); and *Gold Seal Ld.* v. *Attorney-General for Alberta* (44).] This legislation cannot be supported on the ground that it is in relation to trade and commerce.

Secondly, this enactment is not in relation to "the criminal "law" under head 27 of s. 91. The appellant federation relied on a statement in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (45) which, it was submitted, was to the effect that any enactment in a prohibitory form with a penal section was criminal legislation. That statement of Lord Atkin in delivering the judgment of the Board must, however, be construed in relation to the context of the case and also in relation to later decisions of the Board in which Lord Atkin delivered the judgment. The provinces can attach penal sections to their laws. It is the substance of the law that must be looked at; it must be criminal legislation in truth and in substance: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (46); *Attorney-General for Canada* v.

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(38) [1896] A. C. 348, 361.
(39) [1902] A. C. 73, 77, 79.
(40) [1938] A. C. 708, 719.
(41) [1916] 1 A. C. 588, 595.
(42) [1922] 1 A. C. 191, 197.
(43) [1936] S. C. R. (Can.) 398, 410, 412; [1937] A. C. 377, 386.
(44) 62 S. C. R. (Can.) 424, 457.
(45) [1931] A. C. 310, 324.
(46) [1937] A. C. 368, 375.

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Attorney-General for Ontario (47); *Attorney-General for Ontario* v. *Reciprocal Insurers* (48). If this is in pith and substance really "civil rights" legislation, it cannot at the same time be in relation to the criminal law. In pith and substance "criminal "law" under head 27 must be passed to suppress an evil affecting the body politic as a whole. In this case it cannot be legislation in relation to the criminal law to protect one class of citizen against the other. They are attempting to protect the production of butter by prohibiting the production of competitive substances—the farmer against the manufacturer of margarine; that is not legislation in relation to the criminal law.

There are in question here only two heads of s. 91—heads 2 and 27—and then outside those there is the general residuary power under s. 91 to make laws for the peace, order and good government of Canada; but that power is subject to the powers assigned exclusively to the provinces under s. 92: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (49). To avail itself of the power to legislate under that general power the matter must be unquestionably of Canadian interest, and secondly, it must not encroach on any of the enumerated heads of s. 92. My whole argument on the "peace, order and good "government" point is summarized in the observations of Duff, C.J., in the *Natural Products Marketing Act* case (50), which were approved by the Judicial Committee (51). Applying those observations to the present case, nobody is questioning the importance of the dairy industry, but assuming all the facts in the Order of Reference to be true, they do not constitute a sufficient reason to give to the dairy industry a character of national necessity which would distinguish it from the aggregate of local interests so as to bring it within the general residuary power.

Lastly, the legislation cannot be supported under s. 95 as being a law relating to agriculture. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (52) gives the real test to determine whether a law is relating to agriculture within the meaning of s. 95 or is purely and simply a law benefiting agriculture, which is not, according to that decision, a law relating to it. It must be a law interfering with, or relating to, the agricultural operation of the farm.

MacKenna, K.C., followed. Section 5 (*a*) concerns, inter alia, manufacture, and, so far as the section relates to that topic, it is not an exercise of power conferred to pass laws in relation to trade and commerce. There appears to be no case under the

(47) [1937] A. C. 355, 367.

(48) [1924] A. C. 328, 340, 347.

(49) [1896] A. C. 348, 359.

(50) [1936] S. C. R. (Can.) 398, 403–4, 419.

(51) [1937] A. C. 377.

(52) [1933] A. C. 168, 174.

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Canadian Constitution, or under the Australian Constitution where the same words appear, where it has been held that manufacture is included in the words "trade and commerce", a word which prima facie would not extend to trade and commerce. That is a real difficulty in the federation's way in so far as the section prohibits manufacture as distinct from sale. The proposition advanced for the federation that the Dominion has the power to prohibit all trade in any particular commodity is unsound: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (53). Section 91, head 2, admittedly confers a power to regulate trade between Canada and foreign countries; that power can be exercised for the purpose of protecting industry, but because the Dominion may do that it does not follow that it has the power to protect industry by interference with purely provincial trade. With regard to the criminal law point, it is not right to say that a bare prohibition with a penalty attached is a good exercise of s. 91, head 27. There is not a single head in s. 92 which could not be made the subject of a bare prohibition by the Dominion legislature. Lastly, the Act in question in the *Natural Products Marketing Act* case (54) touches agriculture more nearly than a prohibition of the manufacture and sale of margarine. If it is not legislation in relation to agriculture to set up a marketing scheme in order that the farmer may get a good price for his product, it cannot be said that a law which forbids somebody from making margarine is a law in relation to agriculture.

S. A. Hayden, K.C., and *J. W. Blain* (both of the Canadian Bar) for the Hon. W. D. Euler. Examining s. 5 (*a*) independently, its effect is to remove a competing product from the butter market. The manufacture and sale of margarine in any province of Canada, but for this prohibition, would be within "property and civil rights" under head 13 of s. 92. There is nothing in the subject-matter, or in its effect, that would either give to s. 5 (*a*) a federal aspect that would cause it to be outside of s. 92 entirely, or any aspect in which s. 5 (*a*) may be considered so that it comes under some head of s. 91. It was said for the federation that s. 5 (*a*) could not be enacted under s. 92. The authorities show that the prohibitions in the provincial field under head 13 of s. 92 have been held to be a valid exercise of the authority under "property and civil rights". There are decisions of this Board in which prohibitions in a Federal Act have been held to be invalid as an encroachment on head 13 of s. 92, and not a valid exercise of power under s. 91, head 2.

If there is an evil affecting the whole of the body politic of Canada, and legislation to deal with it is passed by the Dominion

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(53) [1896] A. C. 348, 363.

(54) [1937] A. C. 377.

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Parliament which encroaches on " property and civil rights ", it would nevertheless be good. But here the overriding object—to give a benefit to the butter industry—cannot be said to be of such national importance as to take it out of s. 92 and put it into s. 91: there is no overriding national problem in this connexion: *Attorney-General for Ontario* v. *Canada Temperance Federation* (55). To sum up on this point, first, the prohibition contained in s. 5 (*a*) cannot be supported under s. 91, head 2, having regard to the facts; and, secondly, the prohibition of trade, that is, of the manufacture and sale of a particular commodity, is part of the authority which the province enjoys under " property and civil rights " in the province.

With regard to the " criminal law " aspect, the underlying basis of criminal law is in the State's acting for the protection of, and in the interests of, the people as a whole; and that what is detrimental to those interests is that which should be the subject of criminal law. The field is, of course, a shifting one; but, where there is a regulatory statute including penal consequences for failure to comply, that is not of the character of criminal law in s. 91, head 27; the pith and substance of that legislation is something other than the prohibition of a criminal act in the public interest in the sense that it is detrimental to the public: *Attorney-General for Ontario* v. *Hamilton Street Railway* (56); the *Board of Commerce* case (57); the *Reciprocal Insurers* case (58); *Snider's* case (59); the *Proprietary Articles Trade Association* case (60); and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (61).

Finally, on the question of s. 95, " in relation to " agriculture means directly and immediately related to or connected with agricultural operations. The pith and substance of the legislation must in each case be determined on its facts. [Reference was made to *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (62); the *Natural Products Marketing Act* case (63); the *Eastern Terminal Elevator* case (64); *Attorney-General for Canada* v. *Attorney-General for British Columbia* (65); and *In re Insurance Act of Canada* (66).] Trade processes are here applied to milk so as to convert it into a marketable commodity for the purposes of trade, and it is submitted that the connexion between the product that has resulted from those trade processes and agriculture is too indirect

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(55) [1946] A. C. 193, 207.
(56) [1903] A. C. 524.
(57) [1922] 1 A. C. 191.
(58) [1924] A. C. 328.
(59) [1925] A. C. 396.
(60) [1931] A. C. 310.
(61) [1937] A. C. 368.
(62) [1933] A. C. 168, 174.
(63) [1937] A. C. 377.
(64) [1925] S. C. R. (Can.) 434, 439.
(65) [1930] A. C. 111, 119–20.
(66) [1932] A. C. 41, 51.

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and remote to support a conclusion that legislation dealing with butter, for instance, or prohibiting the manufacture and sale of margarine, can be said to be "in relation to" agriculture within the meaning of s. 95.

F. P. Varcoe, K.C., in reply. This is a perfect case for the application of the pith-and-substance doctrine: *Union Colliery Company of British Columbia* v. *Bryden* (67); *Cunningham* v. *Tomey Homma* (68). Here the Dominion legislature was not endeavouring to regulate civil rights in the province, but was seeking to eliminate butter substitutes from Canadian commerce, and to protect the butter industry. This legislation falls under the regulation of trade and commerce because it establishes high butter and milk standards and eliminates cheaper substitutes. The *Hamilton Street Railway* case (69) seems to be the keystone of the criminal-law arch.

October 16. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who, after stating the question referred, s. 5 (*a*) of the Dairy Industry Act, and the answer of the Supreme Court of Canada, continued: The argument in support of the appeal was presented by Mr. Varcoe, K.C., on behalf of the Attorney-General for Canada and by Mr. Milliken, K.C., on behalf of the appellant. They contended that the decision stated in para. 2 of the judgment of the Supreme Court should be reversed, but no question has been raised before their Lordships' Board, either by the appellants or by the respondents, as to the correctness of the decision stated in para. 1.

Counsel supporting the appeal contended that the prohibition of the manufacture, offer, sale, or possession for sale of the goods mentioned in s. 5 (*a*) (hereafter referred to as "the prohibition") was within the powers of Parliament, as defined in the British North America Act, 1867, for reasons which may be briefly summarized as follows: (1.) The prohibition is legislation in relation to the regulation of trade and commerce, and therefore falls within head 2 of s. 91 of the British North America Act, 1867 (hereafter referred to as "the Act"); (2.) It is legislation relating to the criminal law and, therefore, falls within head 27 of the same section; (3.) It is a law for the peace, order and good government of Canada in relation to a matter not coming within any of the heads of s. 92 of the Act, and is within the "residuary "power" conferred by the opening words of s. 91; (4.) It is a law "in relation to agriculture in all or any of the provinces" within s. 95 of the Act.

Each of those arguments raises questions of some difficulty, but they can be dealt with quite briefly, as their Lordships find themselves in agreement, on each point, with the conclusions of the majority of the Supreme Court. It is convenient first to give some account of the earlier history of the legislation which incorporates the prohibition. In 1886 the Parliament of Canada enacted "An Act to prohibit the manufacture and sale of certain substitutes for butter", being chap. 42 of 49 Vict. This Act was in the following terms: "Whereas the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—1. No oleomargarine, butterine or other substitute for butter, manufactured from any animal substance other than milk, shall be manufactured in Canada, or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months".

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(67) [1899] A. C. 580.
(68) [1903] A. C. 151, 157.
(69) [1903] A. C. 524.

It is to be noted that the "certain" substitutes for butter "heretofore" manufactured, the manufacture and sale of which are prohibited, are those manufactured from any animal substance other than milk. By this language margarine, as distinct from oleomargarine, is not affected as the former is manufactured exclusively from vegetable oils, while oleomargarine has in addition some animal fat.

Chapter 42 of 49 Vict. became c. 100 of R. S. C. 1886, but the preamble of the original Act was not continued and does not reappear in any later legislation. Subsequently, by 3 Edw. VII, c. 6: "The Butter Act, 1903" was passed, s. 5 of which prohibits the manufacture, importation or sale of "any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream". It is to be observed that importation, as well as manufacture and sale, became prohibited, and the prohibition is no longer limited to substitutes for butter manufactured from animal substances. Accordingly, margarine would appear to have become included in the prohibitions of this legislation.

In 1906, by c. 85 of the Revised Statutes of that year, the General Inspection Act (c. 99 of the Revised Statutes of 1886), the Grain Inspection Act, 1904 (4 Edw. VII, c. 15), and the Butter Act of 1903, became consolidated in the "Inspection and Sale Act", the provisions formerly constituting the Butter Act becoming Part VIII of the Act. Section 298 is in the same terms as s. 5 of the Act of 1903, the penalty section being s. 309. Part VIII of the last-mentioned Act was repealed by the "Dairy

" Industry Act, 1914". This Act was entitled an " Act to regulate the manufacture or sale of butter substitutes ". Section 5 (*a*) is in exactly the same terms as the prohibition now under consideration, margarine being for the first time expressly mentioned. In the Revised Statutes of 1927, the Dairy Industry Act appears in its present form as c. 45 thereof.

It is to be noted that by Order in Council, P.C. 3044, dated October 23, 1917, made under the War Measures Act, the operation of s. 5 (*a*) of the Dairy Industry Act was suspended, and by c. 24 of the Statutes of Canada, 1919 (2nd Session), provision was made for the manufacture and importation of oleomargarine until August 31, 1920, and sale thereof until March 1, 1921. By annual amendments the permissions contained in the Oleomargarine Act were extended to August 31, 1923, in the case of manufacture and importation, and to March 1, 1924, in the case of sale. During the period December 1, 1917, to September 30, 1923, oleomargarine was manufactured in Canada and imported into Canada on a very large scale.

The summary of legislation just set out shows that the prohibition has been part of the law of Canada for a considerable time, and apparently its validity has never been called in question before the present proceedings. This historical fact does not, however, relieve their Lordships of the task of considering whether the prohibition is or is not within the powers of Parliament as laid down in the Act. To quote the judgment of the Board in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (70), " Their Lordships entertain no doubt " that time alone will not validate an Act which when challenged " is found to be ultra vires ". One other point emerges from the summary. It might have been contended at one time, in reliance on the preamble to the Act of 1886, that the purpose of the prohibition was to exclude from the Dominion substances which were injurious to health; but no such argument is possible today, having regard to the later legislation, in particular the repeal of the earlier legislation by the Dairy Industry Act, 1914, and to the measures taken in 1917 and subsequent years. It cannot be doubted that the object of the prohibition, as it appears in the Dairy Industry Act now in force, is the protection and encouragement of the dairy industry.

The Dairy Industry Act is very fully analysed in the judgment of the Chief Justice. Their Lordships gratefully accept his analysis, without repeating it, and proceed to the consideration of the first argument of counsel supporting the appeal, that the prohibition is legislation in relation to the regulation of trade and commerce. In considering this argument their Lordships are

(70) [1931] A. C. 310, 317.

faced yet again with the difficult task of choosing between the conflicting claims of the Dominion legislature, based on s. 91, head 2, of the Act and of the Provincial legislatures, based on s. 92, head 13. On the one hand, it is said that an enactment which seeks to encourage an important industry in the Dominion by prohibiting all citizens of the Dominion from embarking upon another competing industry can accurately be described as an enactment for the regulation of trade and commerce. On the other hand, it is said that the prohibition covers the manufacture and sale of the goods in question within, for instance, the Province of Quebec, and that the right of a citizen of that province to engage in such manufacture and sale is an important civil right in the province and comes directly within head 13 of s. 92; it is thus one of the classes of subjects assigned by the Act exclusively to the legislatures of the provinces.

If these conflicting claims had never before been considered by the Board their Lordships would be faced with a task of great difficulty, but similar conflicts, on different sets of facts, have been resolved over and over again in past years. Their Lordships think that a decision in favour of the validity of this prohibition would be contrary to the current of authority and, in particular, to certain recent decisions of the Board. They find it unnecessary to pass in review the decisions before the year 1936 which bear on this point. These decisions are summarized with clarity and accuracy in the masterly judgment of Duff, C.J., in the *Natural Products Marketing* case (71). The decision of the Supreme Court in that case was upheld and the judgment of Duff, C.J., was approved by the Board (72), and their Lordships regard the *Natural Products Marketing* case (72) as having a very important bearing on the present appeal. The Act then under consideration provided for the establishment of a Dominion Marketing Board whose powers included powers to regulate the time and place at which, and the agency through which, natural products to which an approved scheme related should be marketed, and to determine the manner of the distribution, and the quantity, quality, grade or class of the product that should be marketed by any person at any time.

Lord Atkin, in giving the judgment of the Board, said (73): "There can be no doubt that the provisions of the Act cover "transactions in any natural product which are completed within "the province, and have no connexion with inter-provincial or "export trade. It is therefore plain that the Act purports to "affect property and civil rights in the province, and if not "brought within one of the enumerated classes of subjects in

(71) [1936] S. C. R. (Can.) 398.
(72) [1937] A. C. 377.
(73) Ibid. 386–7.

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"s. 91 must be beyond the competence of the Dominion legis-" lature. It was sought to bring the Act within the class (2) of "s. 91—namely, The Regulation of Trade and Commerce. "Emphasis was laid upon those parts of the Act which deal "with inter-provincial and export trade. But the regulation of "trade and commerce does not permit the regulation of individual "forms of trade or commerce confined to the province. In his "judgment the Chief Justice says (74): 'The enactments in "'question, therefore, in so far as they relate to matters which "'are in substance local and provincial are beyond the juris-"'diction of Parliament. Parliament cannot acquire jurisdiction "'to deal in the sweeping way in which these enactments operate "'with such local and provincial matters by legislating at the "'same time respecting external and inter-provincial trade and "'committing the regulation of external and inter-provincial "'trade and the regulation of trade which is exclusively local "'and of traders and producers engaged in trade which is "'exclusively local to the same authority: *The King* v. *Eastern* "'*Terminal Elevator Co.* (75).' Their Lordships agree with this, "and find it unnecessary to add anything".

As appears from this passage, the regulation of trade and commerce which is assigned to the Dominion legislature by head 2 of s. 91 does not permit the regulation of individual forms of trade and commerce confined to the province. If such regulation is not permitted, it seems to their Lordships that, a fortiori, the prohibition of individual forms of trade and commerce confined to the province is not permitted. By the prohibition now in question, every citizen of (e.g.) the Province of Quebec is prohibited from manufacturing and selling certain named substances, even if he manufactures only in that province and sells only in that province. It is true that the prohibition applies equally to inter-provincial transactions, but the passage from Duff, C.J.'s judgment, set out and approved by the Board in the *Natural Products Marketing* case (73), seems fatal to any argument based on this fact. So also do the observations of Lord Haldane when delivering the judgment of the Board in the *Dominion Insurance* case (76): "It will be observed that s. 4 "deprives private individuals of their liberty to carry on the "business of insurance, even when that business is confined "within the limits of a province. It will also be observed that "even a provincial company operating within the limits of the "province where it has been incorporated cannot, notwithstand-"ing that it may obtain permission from the authorities of 'another province, operate within that other province without

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(74) [1936] S. C. R. (Can.) 412.
(75) [1925] S. C. R. (Can.) 434.
(76) [1916] 1 A. C. 588, 595.

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" the licence of the Dominion Minister. . . . Such an interference " with its status appears to their Lordships to interfere with its " civil rights within the province of incorporation, as well as " with the power of the legislature of every other province to " confer civil rights upon it. Private individuals are likewise " deprived of civil rights within their provinces ".

The truth is that the present case is typical of the many cases in which the Board has felt bound to put some limit on the scope of the wide words used in head 2 of s. 91 " in order to " preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the " scheme of the Act as a whole, the provinces were intended to " possess "—see per Duff, J., in *Lawson* v. *Interior Tree Fruit & Vegetable Committee of Direction* (77). The necessity for putting such a limit leads to the rejection of counsel's first argument.

In putting forward their second argument, counsel relied strongly on *Attorney-General for Ontario* v. *Hamilton Street Railway* (78), *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (79), and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (the Criminal Code case) (80). They pointed out that s. 10 of the Dairy Industry Act makes any violation of any provision of ss. 5 to 7 an offence, punishable on summary conviction with the penalties set out in s. 10; and that, apart altogether from s. 10, any breach of the prohibition in s. 5 (*a*) would be punishable under s. 164 of the Criminal Code. They submitted that in these circumstances s. 5 (*a*) was such a law as is described in head 27 of s. 91 of the Act.

Their Lordships are unable to accept this submission. It is necessary in each case to consider what is the " pith and " substance " of the legislation in question, and this was recognized by the Board in the *Criminal Code* case (81). In the present case, the prohibition in s. 5 (*a*) is in pith and substance a law for the protection and encouragement of the dairy industry in Canada. Incidentally, penalties are provided for any breach of the prohibition, but their Lordships are quite unable to regard this fact as sufficient per se to make the prohibition a law "for " the peace, order, and good government of Canada in relation " to . . . the criminal law, except the constitution of courts of " criminal jurisdiction, but including the procedure in criminal " matters " within the meaning of head 27 of s. 91. The contrary view would enable the Parliament of Canada to " assume " exclusive control over the exercise of any class of civil rights

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(77) [1931] S. C. R. (Can.) 357, 366.

(78) [1903] A. C. 524.

(79) [1931] A. C. 310.

(80) [1937] A. C. 368.

(81) Ibid. 376.

"within the provinces, in respect of which exclusive jurisdiction "is given to the provinces under s. 92, by the device of declaring "those persons to be guilty of a criminal offence who in the "exercise of such rights do not observe the conditions imposed "by the Dominion". See *Attorney-General for Ontario* v. *Reciprocal Insurers* (82).

Their Lordships' views on this branch of the case may be happily stated by a quotation from the judgments of the majority in the Supreme Court. Rand, J., said (83): "That object [i.e., "the object of prohibition], as I must find it, is economic and the "legislative purpose, to give trade protection to the dairy "industry in the production and sale of butter; to benefit one "group of persons as against competitors in business in which, "in the absence of the legislation, the latter would be free to "engage in the provinces. To forbid manufacture and sale for "such an end is prima facie to deal directly with the civil rights "of individuals in relation to particular trade within the "provinces: *Shannon* v. *Lower Mainland Dairy Board* (84). "The public interest in this regulation lies obviously in the trade "effects: it is annexed to the legislative subject-matter and "follows the latter in its allocation to the one or other legislature. "But to use it as a support for the legislation in the aspect of "criminal law would mean that the Dominion under its authority "in that field, by forbidding the manufacture or sale of particular "products, could, in what it considered a sound trade policy, "not only interdict a substantial part of the economic life of one "section of Canada, but do so for the benefit of that of another. "Whatever the scope of the regulation of inter-provincial trade, "it is hard to conceive a more insidious form of encroachment "on a complementary jurisdiction. This conclusion is not in "conflict with *Attorney-General for British Columbia* v. *Attorney-"General for Canada* (85). (Section 498A of the Criminal Code.) "There, the essential nature of the legislation was not the "equalization of civil rights between competitors or promoting "the interest of one trade as against another; it was the safe-"guarding of the public against the evil consequences of certain "fetters upon free and equal competition. There is no like "purpose here; there is nothing of a general or injurious nature "to be abolished or removed: it is a matter of preferring certain "local trade to others".

With these observations their Lordships entirely agree, and they are fatal to counsel's second argument in support of the appeal. That argument would have had more weight if it had

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(82) [1924] A. C. 328, 340.
(83) [1949] S. C. R. (Can.) 50.
(84) [1938] A. C. 708.
(85) [1937] A. C. 368.

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been possible to contend that the object of the prohibition was to exclude from Canada substances injurious to health.

In support of their third argument, counsel relied principally on *Russell* v. *Reg.* (86), and the recent case of *Attorney-General for Ontario* v. *Canada Temperance Federation* (87), in which *Russell's* case (86), not for the first time, was considered and commented upon. In the latter case Viscount Simon, in delivering the judgment of the Board, said (88): " In their Lordships' " opinion, the true test must be found in the real subject-matter " of the legislation: if it is such that it goes beyond local or " provincial concern or interests and must from its inherent " nature be the concern of the Dominion as a whole (as, for " example, in the *Aeronautics* case (89) and the *Radio* case (90)), " then it will fall within the competence of the Dominion Parlia- " ment as a matter affecting the peace, order and good govern- " ment of Canada, though it may in another aspect touch on " matters specially reserved to the provincial legislatures. War " and pestilence, no doubt, are instances: so, too, may be the " drink or drug traffic, or the carrying of arms. In *Russell* v. " *Reg.* (86), Sir Montague Smith gave as an instance of valid " Dominion legislation a law which prohibited or restricted the " sale or exposure of cattle having a contagious disease. Nor " is the validity of the legislation, when due to its inherent " nature, affected because there may still be room for enactments " by a provincial legislature dealing with an aspect of the same " subject in so far as it specially affects that province ".

This passage must, however, be considered with the words used by Lord Atkin when delivering the judgment of the Board in the *Labour Conventions* case (91): " But the validity of the " legislation under the general words of s. 91 was sought to be " established not in relation to the treaty-making power alone, " but also as being concerned with matters of such general " importance as to have attained ' such dimensions as to affect " ' the body politic ', and to have ' ceased to be merely local or " ' provincial ', and to have ' become matter of national con- " ' cern '. It is interesting to notice how often the words used " by Lord Watson in *Attorney-General for Ontario* v. *Attorney-* " *General for the Dominion* (92) have unsuccessfully been used " in attempts to support encroachments on the provincial legis- " lative powers given by s. 92. They laid down no principle of " constitutional law, and were cautious words intended to safe- " guard possible eventualities which no one at the time had any " interest or desire to define. The law of Canada on this branch

(86) 7 App. Cas. 829.
(87) [1946] A. C. 193.
(88) Ibid. 205.
(89) [1932] A. C. 54.
(90) [1932] A. C. 304.
(91) [1937] A. C. 326, 352–3.
(92) [1896] A. C. 348.

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" of constitutional law has been stated with such force and clarity " by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act (93) dealing with the " six Acts there referred to, that their Lordships abstain from " stating it afresh. The Chief Justice, naturally from his point " of view, excepted legislation to fulfil treaties. On this their " Lordships have expressed their opinion. But subject to this, " they agree with and adopt what was there said. They consider " that the law is finally settled by the current of cases cited by " the Chief Justice on the principles declared by him. It is only " necessary to call attention to the phrases in the various cases, " ' abnormal circumstances ', ' exceptional conditions ', ' standard of necessity ' (*Board of Commerce* case (94)), ' some " ' extraordinary peril to the national life of Canada ', ' highly " ' exceptional ', ' epidemic of pestilence ' (*Snider's* case (95)), " to show how far the present case is from the conditions which " may override the normal distribution of powers in ss. 91 and " 92. The few pages of the Chief Justice's judgment will, it is " to be hoped, form the locus classicus of the law on this point, " and preclude further disputes ".

Their Lordships think it sufficient to say, in answer to this third argument, that the prohibition now under consideration relates to civil rights within each of the provinces and that neither the facts set out in the Order of Reference, nor any other facts of which their Lordships could take judicial notice, lead to the conclusion that there exist in the present case the conditions which may override the normal distribution of powers in ss. 91 and 92.

As to counsel's fourth and last argument, their Lordships have already recognized that the object of the prohibition was to protect and encourage the dairy industry in Canada. For this reason, counsel contend that it is a law in relation to agriculture within s. 95 of the Act, although in form it is merely a prohibition relating to certain manufactured substances. In their Lordships' view, however, the authorities show that this contention is unsound. In *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (96) the Board had to consider the validity of the Dairy Products Sales Adjustment Act, 1929, which authorized the appointment of an Adjustment Committee in any district in which the dairy farmers petitioned for one. The object of the Act was to relieve congestion in the fluid milk market caused by a shortage of demand, and, as Lord Thankerton put it in delivering the judgment of the Board (97):

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(93) [1936] S. C. R. (Can.) 398, 414 et seq.

(94) [1922] 1 A. C. 191.

(95) [1925] A. C. 396.

(96) [1933] A. C. 168.

(97) Ibid. 173.

"Broadly stated, this object is attained by the Committee fixing "monthly the standard prices for fluid milk and manufactured "products respectively and the weight and quantity of each sold "or disposed of by all the farmers in the district, based on "returns compulsorily obtained from them, and thereafter apportioning the difference between the total value of the sales of "each, calculated at the respective standard prices, over the "whole body of farmers, in proportion to the weight of fluid milk "sold or disposed of by each farmer. Each farmer is then "bound to contribute his share of the apportionment to the "Committee, who apportion and pay the total amount so received "to the farmers who have sold or disposed of the manufactured "products".

Lord Thankerton also said (98): "The contention of the "appellants that the Act of 1929 is a law relating to agriculture "under s. 95 of the Act of 1867 may be disposed of as untenable, "for the Act of 1929 does not appear in any way to interfere "with the agricultural operations of the farmers, and s. 21 of "the Act expressly prohibits the Committee from fixing prices "at which milk or manufactured products may be sold, and "from directing in what quantity, to whom, or when milk or "manufactured products may be sold or disposed of by a dairy "farmer".

This passage bears strongly against the argument for the appellant federation, for it might well be thought that the Act which the Board was then considering could more easily be described as an Act in relation to agriculture than can the prohibition now under consideration.

It is significant that in the *Natural Products Marketing* case, already cited (99), it was not even argued that the Act in question, The Natural Products Marketing Act, 1934, came within s. 95 of the Act. No mention appears to have been made of s. 95 of the Act, either before the Board or in the Supreme Court of Canada. In their Lordships' view the Act of 1934 was more closely related to agriculture than the prohibition now under consideration; it may be that counsel considered an argument based on s. 95 to be hopeless, in view of the observation of Lord Thankerton already quoted.

If, however, there were any doubt as to the principles to be applied in construing s. 95, it is removed, in their Lordships' view, by a passage in the judgment of the Board, delivered by Viscount Simon, in *Attorney-General for Saskatchewan* v. *Attorney-General for Canada* (100). The Act then under consideration was the Farm Security Act, 1944, of Saskatchewan, and the

(98) Ibid. 174.
(99) [1937] A. C. 377.
(100) [1949] A. C. 110.

main object of that Act was to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of there being in any year a crop failure as defined in the Act. A portion of the Act relating to a reduction of interest was attacked as being ultra vires the provincial legislature, and the portion attacked was sought to be upheld on the ground that its pith and substance was " agriculture in the province " within the meaning of s. 95 of the Act, and that it was not repugnant to any Act of the Parliament of Canada. In dealing with this contention, which had been supported by the dissenting judgment of Taschereau, J., in the Supreme Court, Viscount Simon said (101): " It is convenient to deal first with this last contention, which provided a chief ground on which the dissenting judgment of Taschereau, J., was based. There was abundant evidence that agriculture is the main industry of Saskatchewan and that it is the principal source of revenue of its inhabitants. It is moreover clear that the result of the impeached legislation, if it is validly enacted, would be to relieve in some degree a certain class of farmers from financial difficulties due to the uncertainties of their farming operations. But, as Rand, J., points out, there is a distinction between legislation ' in relation to ' agriculture and legislation which may produce a favourable effect on the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is ' the true nature and character of the ' legislation '—not its ultimate economic results—that matters (*Russell* v. *Reg.* (102)). Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase ' agriculture in the ' province ' may be construed, and whatever advantages to farmers the re-shaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture ".

Although the prohibition now under consideration relates to a different subject-matter, the passage just quoted would seem to apply with much force to the present case. The prohibition might well " produce a favourable effect on the strength and " stability " of the dairy industry; but the passage just quoted shows that this fact alone is not sufficient to make it legislation " in relation to agriculture " within s. 95; and there is no other ground on which it can be brought within s. 95. To sum up, the connexion between the prohibition and the operations carried on by farmers is too indirect and remote to bring the prohibition

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(101) Ibid. 122–3.

(102) 7 App. Cas. 829, 840.

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within the terms of s. 95, and for this reason counsel's fourth and last argument fails.

Their Lordships are of opinion that the Supreme Court of Canada rightly answered that "the prohibition of manufacture, "offer, sale, or possession for sale of the goods mentioned is "ultra vires of Parliament". This was the only question raised in this appeal and their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Charles Russell & Co.; Blake & Redden; Lawrence Jones & Co.; Slaughter & May.*

JOHN LAVINGTON BONYTHON AND OTHERS . APPELLANTS;

AND

COMMONWEALTH OF AUSTRALIA . . RESPONDENT.

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Oct. 30.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

Considered. NAT. BANK OF AUSTRALASIA *v.* SCOTTISH UNION [1952] A.C. 493

Australia—Currency—Queensland Government debentures issued in 1895—"Pounds sterling"—Option for repayment in London—State public debt taken over by Commonwealth—Inscribed Commonwealth stock issued in place of debentures—Rights and obligations retained—Redemption—Substance of obligation to be determined by proper law of contract—Repayment in Australian currency equal to nominal amount inscribed.

The appellants were the holders of several sums of consolidated inscribed 3½ per cent. stock of the Commonwealth of Australia which had been issued by the Commonwealth in 1932 against the surrender of certain Queensland Government debentures when, under the terms of a financial agreement, the public debt of Queensland, which included the liability of the State under the debentures, was taken over by the Commonwealth. The inscribed stock was issued subject to the condition that it conferred on the registered holders rights which conformed in all particulars with those conferred by the Queensland Government debentures. Those debentures, which were issued in 1895 for varying amounts in "pounds sterling", stipulated, inter alia, that "the principal sum will be payable on "January 1, 1945, either in Brisbane, Sydney, Melbourne or

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* *Present*: VISCOUNT SIMON, LORD SIMONDS, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD REID.

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"London at the option of the holder". On a claim by the appellants that on redemption they were entitled to be paid in London the nominal amount of the stock in English currency, or, alternatively, to be paid in Australia the equivalent in Australian currency of such amounts of English currency,

Held, that it was impossible to infer from the mere use of the word "sterling" in conjunction with the word "pound" in a document of 1895 that the currency of England rather than that of Queensland was intended. The substance of the obligation created by the debenture was the same whatever the place of payment, and must be determined by the proper law of the contract, that was, the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connexion. On the assumption that no express reference was made to the proper law of the contract, that question became a matter of implication to be derived from all the circumstances of the transaction. Applying that test to the present case, there was overwhelming evidence that it was to the law of Queensland that the parties looked for the determination of their rights, and that law accordingly governed the contract and determined the meaning of the word "pound".

The Government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system whether or not those terms were apt to refer to another system also. In the absence of anything to rebut that presumption it must prevail, and it would then follow that in the present case the obligation to pay would be satisfied by payment of whatever currency was by the law of Queensland valid tender for the discharge of the nominal amount of the debt.

Adelaide Electric Supply Co. Ld. v. *Prudential Assurance Co. Ld.* [1934] A. C. 122; *Auckland Corporation* v. *Alliance Assurance Co.* [1937] A. C. 587; *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A. C. 500; *In re Chesterman's Trusts* [1923] 2 Ch. 466; the *Legal Tender* cases (1871) 79 U.S. 382, considered.

Goldsbrough, Mort & Co. Ld. v. *Hall* [1948] V.L.R. 145; (1948–9) 78 C.L.R. 1, approved.

Order of the High Court of Australia (1947–8) 75 C.L.R. 589, affirmed.

APPEAL (No. 25 of 1949), by special leave, from a judgment and order of the High Court of Australia (May 31 and June 17, 1948).

The following facts are taken from the judgment of the Judicial Committee: The substantial question raised in the appeal was whether (as the appellants asserted but the respondent denied) the appellants, as holders of several sums of consolidated inscribed 3½ per cent. stock of the Commonwealth of Australia, maturing on January 1, 1945, were entitled to be paid in London the nominal amounts of such stock in English currency or, alternatively, to be paid in Australia the equivalent in Australian currency of such amounts of English currency.

The appellants instituted their action in the High Court, claiming the relief to which they alleged that they were entitled. At the trial of the action on October 15, 1947, the Chief Justice (Latham, C.J.), with the consent of the parties and under s. 18 of the Judiciary Act, 1903–1947, stated a case and referred for the opinion and consideration of the Full Court of the High Court the relevant questions of law. It was proper, particularly in view of certain submissions made on behalf of the respondent on the appeal, that the case stated should be set out in some detail. The material parts of it were as follows (the appellants being referred to as the plaintiffs and the respondent as the defendant):—

"1.—The plaintiffs respectively are and since before "July 1, 1944, have been inscribed in a stock ledger kept "at a Registry established by the defendant at Adelaide "under the Commonwealth Inscribed Stock Act, 1911–1945, "as the holders of Commonwealth consolidated inscribed "stock 3.5 per cent. maturing January 1, 1945, (hereinafter "referred to as 'Commonwealth inscribed stock') in the "following amounts, that is to say:—[The amounts held by "the several plaintiffs are then set out.] The plaintiffs are "and at all material times have been resident in Australia.

"2.—The Commonwealth inscribed stock referred to in "paragraph 1 hereof was originally issued by the defendant "in or about the month of March, 1932, to the Australian "Mutual Provident Society upon the surrender of Queensland Government debentures hereinafter referred to. It is "admitted that the said Commonwealth inscribed stock was "issued to the Australian Mutual Provident Society subject "to the condition that the same conferred upon the registered holders thereof for the time being rights which conformed in all particulars with the rights conferred by the "said Queensland Government debentures.

"3.—By the provisions of Act 58 Victoria No. 32 of the "Parliament of Queensland and known as the Government "Loan Act of 1894 the Governor-in-Council of the Colony of "Queensland was authorized to raise by way of loan for the "public service of the Colony such several sums of money "not exceeding in the whole the sum of two million pounds "as might be required for purposes therein set out. "Pursuant to the powers conferred by the said Act the "Governor-in-Council for the said Colony of Queensland on "April 26, 1895, raised by way of loan in London, England, "the sum of 1,250,000*l*., part of the sum authorized by the "said Act, and on July 3, 1895, raised by way of loan in "Australia sums of 250,000*l*. and 500,000*l*. respectively "balance of the sum so authorized, and in respect of all the

" sums so raised issued debentures for varying amounts but " otherwise in the form following, that is to say:

" One Thousand Pounds
" Queensland Identical S1. T1.
" Government " Debenture
" No. 1 " 1,000*l*. Series S1.

" Issued by the Governor-in-Council, by authority of the " Parliament of Queensland under the Act 58 Victoria " No. 32.

" This debenture entitles the holder to the sum of one " thousand pounds sterling, which, together with interest at " the rate of three pounds ten shillings per centum per " annum is secured upon the consolidated revenue of " Queensland.

" The principal sum will be payable on the first day of " January, 1945, either in Brisbane, Sydney, Melbourne or " London at the option of the holder; but notice must be " given to the Treasurer of the Colony, on or before the first " July, 1944, of the place at which it is intended to present " this debenture for payment of such principal.

" The interest will commence on the first day of January, " 1896, and will be payable on January 1 and July 1 in each " year, at the Treasury in Brisbane or at the offices of the " agents of the Government in Sydney, Melbourne or " London on presentation of such of the annexed coupons " as shall then be due, and not otherwise.

" When this debenture is issued the place at which the " purchaser wishes the interest first falling due to be paid, " shall be endorsed on the debenture; any change in the " place of payment of interest must be registered at the " Treasury in Brisbane or at the offices of the agents of the " Government in Sydney, Melbourne or London six months " prior to the date on which such interest shall be payable, " and the transfer at the same time endorsed on the " debenture.

" Dated at Brisbane this 1st day of November, 1895.

" E. Deshon, " H. W. Norman,
" *Auditor General.* " *Governor of Queensland.*
" T. M. King, " Hugh M. Nelson,
" *Under Secretary.* " *Colonial Treasurer.*

" 4.—The sum of 250,000*l*. referred to in paragraph 3 " hereof was wholly subscribed by the Australian Mutual " Provident Society, a company incorporated and carrying " on business in Australia, and with respect thereto the

"Governor-in-Council in Queensland caused 150 of the "debentures referred to in paragraph 3 hereof each for the "sum of 1,000*l*. and 200 of the said debentures each for the "sum of 500*l*., to be issued in Queensland to the said "Australian Mutual Provident Society.

"5.—On each of the debentures referred to in para-"graph 4 the place at which the purchaser wished the "interest first falling due to be paid was endorsed as Sydney. "No change in the place of payment of interest under the "said debentures was registered.

"6.—The following is a copy of the form of coupon "annexed to the said 1,000*l*. debentures:—

"Queensland Government Debenture

"1,000*l*. Series S1. 1,000*l*.

"Half year's dividend at the rate of three pounds ten "shillings per centum per annum, due January 1, 1945.

"17*l*. 10*s*. 0*d*. H. M. N.

"The coupon annexed to the said 500*l*. debentures was in "the same form except as to the sums mentioned therein.

"7.—Under and by virtue of an agreement made the "12th day of December, 1927, between the defendant of the "first part, and the States of New South Wales, Victoria, "Queensland, South Australia, Western Australia and "Tasmania of the second, third, fourth, fifth, sixth and "seventh parts, and under and by virtue of the Financial "Agreement Act, 1928, No. 5 of 1928, the Financial Agree-"ment Validation Act, 1929, No. 4 of 1929, and the "Financial Agreements (Commonwealth Liability) Act, "1932, No. 2 of 1932 (all of the Parliament of the Common-"wealth of Australia), the public debt of the State of "Queensland, which included the liability of that State "under and in respect of the debentures mentioned in para-"graph 4 hereof, was taken over by the defendant.

"8.—Upon the issue to the Australian Mutual Provident "Society of the Commonwealth inscribed stock referred to "in paragraph 1 and for some time thereafter the same was "inscribed in the stock ledger kept at the Registry in "Brisbane and interest was paid there. Upon or subse-"quently to the plaintiffs becoming the holders of the said "stock the same was transferred to the Registry kept at "Adelaide and thereafter interest was paid there."

The case then set out correspondence passing between the appellants and the respondent, which might be briefly summarized. On or about December 15, 1944, the Treasurer of the Commonwealth sent to the holders of the inscribed stock in question a letter inviting them to convert their maturing securities into a new issue made by the Commonwealth and adding that, if they should not find it possible to convert their securities, they would be "redeemed on the due date on presentation at the Commonwealth Bank". To that letter the appellants made no answer. By letters written by or on their behalf on December 22, 1944, to the Deputy Registrar of inscribed stock at Adelaide the appellants requested that "in accordance with the conditions on which the said stock was issued" the amount of the stock held by them respectively should "be paid on maturity in London in sterling". On December 30, 1944, the Deputy Registrar replied that that request had been submitted to the Commonwealth Treasury, adding that the conditions of the loan provided that six months' notice of redemption in London would be necessary and enclosing certain forms which he invited them to fill in and return. The forms were alternative and were for conversion of the existing securities to a new loan or for redemption in cash. On or about January 2, 1945, the Deputy Registrar wrote a further letter to the appellants in which, after quoting the redemption provisions of the original debentures, he added, "As the holders of the stock did not give the notice required by the terms of the debenture they are now precluded from exercising an option for payment in London".

The case then proceeded as follows:—

"16.—None of the plaintiffs completed the forms referred to in paragraph 14 hereof, nor did they or any of them present the said inscribed stock at the Commonwealth Bank.

"17.—The defendant has not paid to the plaintiffs or any of them the principal moneys due on maturity of the said inscribed stock. On and from January 1, 1945, the defendant was at all times ready and willing to repay the said principal moneys in Australian currency equal to the amount inscribed but no larger amount, at Adelaide aforesaid or elsewhere in Australia as might be required by the holder. Save as appears from the letters hereinbefore set forth, no notice for the redemption of the said inscribed stock has been given by the Treasurer of the Commonwealth to the plaintiffs or any of them.

"18.—The parties having appeared before me and agreed that all the facts necessary to determine this action are stated in this case I state the following questions of law arising in the action for the opinion and consideration of the Full Court of the High Court of Australia:—(a) With respect to the Commonwealth inscribed stock held by the plaintiffs was the defendant bound to pay the principal

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"sums secured thereby in English currency in London six "months after the date of the delivery of the letters referred "to in paragraphs 10, 11 and 12 of this case? (b) If nay, "when and where did such moneys become due and payable? "(c) If the principal sums are payable in Australia are the "plaintiffs respectively entitled to be paid in Australian "currency the equivalent of the principal sums in English "currency? (d) Are the plaintiffs respectively entitled to "interest upon the amount of the said stock held by each "of them at 3½ per cent. per annum since January 1, 1945? "Dated this 15th day of October, One thousand nine hundred "and forty-seven.

"J. G. Latham,
"*Chief Justice.*"

Those questions were answered as follows: the majority of the Full Court (Rich, Dixon and McTiernan, JJ.) answered questions (a), (c) and (d) in the negative; Dixon and McTiernan, JJ., thought it unnecessary to answer (b); Rich, J., was of opinion that the principal sums were payable at the places mentioned in the debentures on presentation of the inscribed stock. Latham, C.J., and Starke, J., dissented, the former being of opinion that the appellants were entitled to be paid in Australia on January 1, 1945, the equivalent in Australian currency of the principal sums in English currency, the latter that they were entitled to be paid the principal sums on January 1, 1945, in English currency in London. Both Latham, C.J., and Starke, J., were of opinion that the appellants were not entitled to interest; but Starke, J., thought that they were entitled to damages for breach of contract by reason of the respondent's failure to pay on January 1, 1945, and that such damages might be measured by the interest payable on the said stock.

Those answers having been remitted to the Chief Justice, he gave judgment in conformity with the answers of the majority, and from that judgment this appeal was brought.

1950. July 10, 11, 12, 13. *F. Grant, K.C.*, and *James Stirling* for the appellants. The primary question, which turns on the construction of the debentures as in 1895, is whether, as is submitted, the appellants are entitled in respect of each 1,000 pounds of debenture to be paid 1,000*l.* sterling, which is now English money, or the equivalent in Australian currency, which would be 1,250*l.* Australian, or whether they are entitled, as the respondent submits, to be paid 1,000*l.* Australian or the equivalent of that in English money.

There are two subsidiary questions, the first the place at which the appellants are entitled to be paid. If they are right

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on the first submission, then the place of payment does not very much matter. Alternatively, if they are wrong on the construction of the debenture, and it is not 1,000*l*. English, then it is submitted that the true view, following a certain line of cases, is that the amount of the obligation has to be measured in the currency of the place in which payment has to be made. On that, of course, it is vital that the appellants are entitled to be paid in London.

Assuming that they succeed on one or other of the first two points, then the other subsidiary point is whether they are entitled under the equivalent of Lord Tenterden's Act, which is still law in Australia, to interest from January, 1945, or some other date, onwards. That, if it can be awarded at all, would be damages for detention of money.

On the first point, "sterling", according to its ordinary meaning in 1895 and as a matter of construction, means English currency. Under s. 3 of the Government Loan Act, 1894, of Queensland, there is authority to sell these debentures in London, and the debenture says that the holder is to get 1,000*l*. sterling, which means in English currency. If it means Queensland pounds as distinct from English pounds then that is an end of the case. Latham, C.J., was right in saying that it means English currency. If that view on construction be wrong, then it is submitted that there is not sufficient material to imply Queensland currency, and the whole position then is that the money must be repaid in the currency of the country in which payment is to be made—which is the middle course. The word "pound" in 1895 was equally applicable to money of England and of Queensland, and the value was the same; and it is ambiguous between the two countries unless there is some implication to the contrary. When using the word "sterling" in 1895, English rather than Queensland currency would be intended. [The definition of "sterling" in the Shorter Oxford Dictionary was referred to.]

There appears to be no reported case in which the word "sterling" has been held to exclude English currency other than that to which Latham, C.J., referred, *Maudsley* v. *Colonial Mutual Life Assurance Society Ld.* (1), in which it was held that a life insurance policy for "one thousand pounds sterling" issued in 1890 imposed an obligation to pay only in Australian pounds. Latham, C.J., said that he did not agree with that decision. It was a case where there was no English feature at all.

In support of the first submission reliance is placed on *Broken Hill Proprietary Co.* v. *Latham* (2), where it was said by Maugham, J.: "The contract is contained in a commercial

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(1) [1945] V. L. R. 161.

(2) [1933] 1 Ch. 373, 392.

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"document and the words must be construed according to their "ordinary and popular meaning. From this point of view it is "difficult to see why a holder demanding payment in London of, "say 100*l.*, should be bound to accept something less in the "absence of an express clause to that effect". The decision of the Court of Appeal in the *Broken Hill* case (2), which reversed the judgment of Maugham, J., was overruled in *Adelaide Electric Supply Co. Ld.* v. *Prudential Assurance Co. Ld.* (3), in which it was held that the obligation was to be discharged in whatever currency was legal tender in the country in which the debt was to be paid—in that case Australia.

The next case, chronologically, *Payne* v. *Deputy Federal Commissioner of Taxation* (4), does not assist here. Then comes *Auckland Corporation* v. *Alliance Assurance Co.* (5), where it was said that "In the *Adelaide* case (3), however, there was no "express term to show what currency was intended by the word "'pound'. The House of Lords held that the true meaning of "the word 'pound' must be determined on the basis of a rule "depending on a well-known principle of the conflict of laws— "namely, that the mode of performance of a contract is to be "governed by the law of the place of performance". The essential difference in *De Bueger* v. *Ballantyne & Co.* (6) is that when the contract was made the value of the currencies had greatly diverged, and the case is only referred to for the reference it makes to the *Adelaide* case (7). *Permanent Trustee Co. of N.S.W. Ld.* v. *Pym* (8) is also referred to for the observations made in it regarding *De Bueger's* case (6).

The only other authority on the main point is *Goldsbrough, Mort & Co. Ld.* v. *Hall* (9). In that case the word "sterling" was not used in the original trust deed, and the Chief Justice there said that any attempt to discover what the parties would have said if they had contemplated a divergence in the value of the currencies was mere speculation. The only point of that case for the present purpose is its result, and the division of opinion, which indicate that it is not clear what the implication is when there is that division of opinion.

Summing up, "pounds sterling" in 1895 as a matter of construction was in this debenture meant to mean English currency. If that be wrong, then the true view is that laid down in the *Auckland* case (10) and the *Adelaide* case (7), namely, that the word "pound" is to be interpreted as being the currency of the country in which the obligation is to be met and payment has to

(3) [1934] A. C. 122.
(4) [1936] A. C. 497.
(5) [1937] A. C. 587, 606.
(6) [1938] A. C. 452.
(7) [1934] A. C. 122.
(8) (1938) 39 N. S. W. St. R. 1, 5.
(9) [1948] V. L. R. 145; [1948–9] 78 C. L. R. 1.
(10) [1937] A. C. 587.

be made. Assuming the appellants to be wrong on the first point but right on the second, then they have not lost their right to be paid in London, because inasmuch as the provision for notice to be given on July 1, 1944, refers indifferently to all the four places of payment, the true view is that the provision is merely for the giving of a notice before July 1, 1944, which was a necessary condition of being entitled to be paid on January 1, 1945; and on a mere failure to give a notice they still have the right to require payment in any one of the four places, but only after reasonable notice. The appellants, having duly required payment to be made in London, are entitled to be paid in London in currency which is there legal tender for the face value of the stock held by them.

Lastly, on the question of interest, s. 28 of Lord Tenterden's Act (3 & 4 Will. 4, c. 42) is reproduced in the various Australian States; so there must be a sum certain payable by virtue of a written instrument at a certain time, and there is that here. It is in the nature of damages for detention of money. That involves that there must be a default, and it is submitted that there was default here. In principle, if the appellants be right on any of the grounds, then they are right as regards interest or damages.

A. R. Taylor, K.C. (of the Australian Bar), *Megaw*, and *R. Else-Mitchell* (of the Australian Bar) for the respondent. The expression " pounds sterling " in the Queensland debentures was a reference to the lawful money of Queensland, and therefore, even if the appellants were entitled to repayment in London, they were entitled to receive only the amount in English currency not greater than the number of Queensland pounds in the debenture. Secondly, whatever the answer to the first question may be, the appellants did not become entitled to repayment in London. Thirdly, the amount to which the appellants are entitled is the number of pounds, being Australian pounds, specified in the Commonwealth inscribed stock which was issued in 1932. Finally, the appellants are not entitled to interest.

The first of the above questions arises completely independently of any stipulation for payment outside Australia. The original obligation was to pay 1,000*l*. in sterling, whatever that might be, and it would be in Queensland, not English, currency. If the Chief Justice be right, it would mean, in the case of a loan between two residents in Queensland, that it would have to be repaid in English currency—that must be the result of his view. What was a pound in Queensland in 1895, and what was a pound sterling in 1895, was determined by the law of Queensland. It was said for the appellants that there is no authority to the effect that a promise to pay in sterling in some other place than England meant a promise to pay in pounds of that country; but in the *Adelaide* case (11) Lord Wright referred to the *Case de Mixt Moneys* (12), and that is this very case. And in *Taylor* v. *Booth* (13) it was said that "if a man draws a bill in Ireland "upon England, and states that it is for sterling money, it must "be taken to mean sterling in that part of the United Kingdom "where it is payable". The view there was that in the absence of any express or necessarily implied term to the contrary, the obligation to pay sterling was discharged by payment of lawful currency of the place of payment.

In *Maudsley* v. *Colonial Mutual Life Assurance Society Ld.* (14) there is a reference to the use of the word "sterling" in Australia, and there was evidence in that case of the way in which it was used there before 1930. Reliance is placed on that case to show that the judges below in the present case, except the Chief Justice, accepted the proposition that the word "sterling" added nothing to the form of currency which circulated in Australia in 1894. That is supported by evidence; it appeared that the word "sterling" was popularly and consistently used to describe money circulating in Australia. It may also be pointed out that the appellants received interest at 3½ per cent. on each 1,000 Australian pounds of capital: if their contention be right they should have received 3½ per cent. interest of 1,250*l.* Australian. That consideration shows again that the word "sterling" was used in the debentures completely inconsequentially and not for the purpose of pointing a distinction between lawful money of Queensland and English money.

In the *Broken Hill* case (15) Maugham, J., took the view that there was only one currency system, not only at the time when the obligation was imposed, but when it was discharged. Two members of the Court of Appeal took the view that there were then two currencies, Australian and English. It is submitted that if Maugham, J., had taken the view that there were two currencies he would have had to deal with the question of implication. In the *Adelaide* case (16) the contract provided for payment in Australia, and the expression used was "pound", which was capable at that time of describing equally well English or Australian money, and all that it was necessary to decide for the purposes of the decision was that where the parties, not having expressed any other intention, specified their obligation in terms which were capable of describing the money of account of the place of payment equally as well as in other money of account, it might be presumed that they were contracting by reference to the money of account of the place of payment. It

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(11) [1934] A. C. 122, 152.

(12) (1604) Davies's Rep. (Ireland) 48.

(13) (1824) 1 Car. & P. 286.

(14) [1945] V. L. R. 161.

(15) [1933] 1 Ch. 373.

(16) [1934] A. C. 122.

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is submitted that although they are called by the same name, they are different moneys of account. The *Adelaide* case (17) could have been decided without touching the *Broken Hill* case (18). The *Auckland* case (19), in effect, is almost treated as being concluded by the *Adelaide* case (17), but it is submitted that it is quite a different case. Where options are given as to the place of payment that circumstance does not in any way affect the question of what money of account the obligation should be paid in. [Reference was also made to *Maudsley* v. *Colonial Mutual Life Assurance Society Ld.* (20) and *Goldsbrough, Mort & Co. Ld.* v. *Hall* (21).] Terms may be implied in contracts only where necessary—where something has happened for which no provision was made. If there is any ambiguity in the present case it must be determined on the construction of the document itself. *De Bueger's* case (22) shows that it was clearly recognized at that time that there were two currencies, and that before the divergence of the currencies the pound sterling appropriately described Australian, New Zealand and English money. "Sterling" in 1895 could not have been used to distinguish one currency from another—it was popularly used in Australia: Mann on the Legal Aspect of Money (1st ed.), pp. 165, 168.

It is conceded that, where there is a contract which stipulates a place of payment and the money of account describes appropriately the currency of that place, it will be presumed, in the absence of any other intention, expressed or necessarily implied, that the money of account was the money of the place of payment. It does not follow, however, where the parties have stipulated alternative places for payment, that the money of account was to be the money of account of the place ultimately chosen for payment, because the meaning of money of account must be selected as a matter of construction. What did the parties mean? And, where there is an option given to be paid in A, B or C, the selection of B, perhaps five minutes before the money became payable, does not throw any light on what the intention of the parties was, because that must be taken to be ascertained at the time of the contract. Construing the debenture itself in the light of what the intention of the parties was—"sterling" appears once, and the figures and words "1,000 "pounds" in other parts of it without any qualification—it was a reference to the lawful money of Queensland.

With regard to the option point, reliance is placed on the view of the Chief Justice below, that "the debenture says nothing

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(17) [1934] A. C. 122.
(18) [1933] 1 Ch. 373.
(19) [1937] A. C. 587.
(20) [1945] V. L. R. 161, 164–5.
(21) 78 C. L. R. 1, 13–14.
(22) [1938] A. C. 452, 457.

"about six months' notice. It requires notice on or before "July 1, 1944, if the holder desires to receive payment at any "particular one of the places mentioned. . . . The right to be "paid in one particular place, e.g., London, was expressly made "conditional on the giving of the notice, and the notice was not "so given". That is a correct statement of the principle on which it must be decided whether or not an option has been validly exercised; it must be according to its terms. As a matter of plain construction, whether it affects substantive rights or not, the option was not exercised.

The next point is that this case arises with respect to a right based on the ownership of the Commonwealth inscribed stock, and distinct from the debentures. There are two currencies, English and Australian, and when Commonwealth inscribed stock was issued for 80,400*l*., that meant 80,400*l*. Australian, and the Inscribed Stock Act says that it shall be redeemable at par. Accordingly the appellants were entitled to the number of pounds specified in the inscribed stock, being pounds in lawful Australian currency as distinct from pounds in English currency. The stock was issued in 1932 on certain conditions, but a collateral agreement cannot affect the amount of currency to be repaid. The expression "rights which conformed in all particulars" cannot mean literally the same rights; it does mean the same rights mutatis mutandis that the holder had with respect to the debenture. Further, para. 3 (c) of the statement of claim alleges that there is only a right to an "equal amount" of inscribed stock.

Lastly, there could not be a declaration that the appellants are entitled to interest. Section 28 of Lord Tenterden's Act gives a discretion to a jury (and, it may be added, to a court) to allow damages by way of interest on the trial of any issue. The question of interest only arises where the judgment will be for a sum of money. This is a claim for a declaration of right.

Megaw followed. [He referred to *De Bueger's* case (23), the *Adelaide* case (24), the *Mixt Moneys* case (25), the *Auckland* case (26), *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society* (27) and *In re Chesterman's Trusts* (28).]

F. Grant, K.C., in reply. It is said in the case stated that "the parties . . . agreed that all the facts necessary to determine "this action are stated in this case". It ought not to be open to the respondent to raise now the entirely new point that the appellants' rights are based on the inscribed stock as distinct from the debentures, especially when the necessary facts are not before the Board.

(23) [1938] A. C. 452, 461.
(24) [1934] A. C. 122, 152–3.
(25) Davies's Rep. (Ireland) 48.
(26) [1937] A. C. 587, 606.
(27) [1938] A. C. 224, 241.
(28) [1923] 2 Ch. 466.

The words "pounds sterling" mean English money. What has to be determined is the meaning of those words on construction of the document having regard to the context and the surrounding circumstances. There is nothing to displace the prima facie presumption that what is meant here is English currency. It is immaterial to this argument whether there were in 1895 two currencies or one. The *Mixt Moneys* case (25) is of no help on this point—the facts are completely different and it was decided 300 years ago. Both principal and interest are on an English currency basis. With regard to the notice, it did not move from the appellants the right to say where they wanted to be paid. The delay in giving notice did not harm anybody except the lender. If the option has been lost the appellants are not in a position to claim payment anywhere, and therefore not in London. This option is merely a matter of administrative convenience. The appellants have not lost their option. Lastly, the Board has, of course, a discretion as to interest. Section 28 of Lord Tenterden's Act says "on the trial of any issue". The appellants are entitled to interest from January, 1945.

Oct. 30. The judgment of their Lordships was delivered by LORD SIMONDS, who stated the facts set out above and continued:—Before dealing with the matters which alone appear on the face of the case to have been in dispute between the parties and were the subject of conflicting opinions in the High Court, their Lordships must deal with a submission made on behalf of the respondent which admittedly was not made to the High Court. It was to the effect that, whatever rights the appellants might have had if they had retained the original debentures, their present rights must be determined solely by their status as holders of consolidated inscribed stock of a certain issue made under the authority of the Commonwealth Inscribed Stock Act, 1911–33, and that the statutory terms of issue and redemption precluded the payment of anything but the nominal amount of the stock in Australian currency at par. Their Lordships do not feel at liberty to entertain this submission. The statement in paragraph 2 of the case (which was based on allegations and admissions in the pleadings) that the inscribed stock was issued "subject to the condition that the same conferred upon the "registered holders thereof for the time being rights which con-"formed in all particulars with the rights conferred by the said "Queensland Government debentures", the further statement in paragraph 18 that "all the facts necessary to determine this "action are stated in this case", the form and substance of the questions submitted for this opinion of the Full Court, and the opinions delivered by the several members of that court, make it clear that the action has throughout proceeded on the footing

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that, though not all the terms and conditions of the original debentures were appropriate to the substituted inscribed stock, yet their rights in regard to the currency in which, and the place at which, payment should be made were unaltered. It is on this footing that their Lordships decide this appeal.

The first question that emerges arises on a narrow point of construction. It is whether the appellants, having failed to give the proper notice on or before July 1, 1944, in any event lost their right to require payment in sterling in London. This would not necessarily be fatal to their substantial claim, for, in the opinion of Latham, C.J., they would, though precluded from requiring payment in London, still be entitled to payment in Australia of the equivalent in Australian pounds of the nominal amount of their stock in English pounds. Nor, on the other hand, would it avail them to succeed on this point if, being paid in London, they were entitled to be paid in English pounds only the equivalent of the nominal amount of their stock in Australian pounds. The vital question to be decided is what was the substantial obligation created by the debenture. Their Lordships, nevertheless, think it right, in view of the difference of opinion in the High Court, to make some observations on this preliminary matter.

As has already been stated, the original debentures provided that the principal sum would be payable on January 1, 1945, either in Brisbane, Sydney, Melbourne or London at the option of the holder, but that notice must be given to the Treasurer of the Colony on or before July 1, 1944, of the place at which it was intended to present the debenture for payment. No provision was made for the event of notice not being given on or before July 1, 1944, an event which happened in the case of the appellants. What, then, are their rights? Two views are possible: the first, for which the appellants contend, that, as they had on December 22, 1944, nominated London as the place of payment, the respondent was bound to pay in London within a reasonable time after notice had been given, and at the latest on June 22, 1945; the second, for which the respondent contends, that it was a condition precedent to the option being exercised that due notice should be given on or before July 1, 1944, and that, the condition not having been complied with, payment was due only in Australia. It was not made clear, on the footing that the respondent's contention was right, at what place in Australia payment must be made, and this difficulty is not diminished by the change that has taken place in the nature of the security.

Their Lordships, for a reason which will shortly appear, do not find it necessary to determine which of these conflicting views is the right one. If the option is not exercised no place is designated for payment, and the proper place of payment must

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in that case be implied from the terms of the debenture. It is difficult, however, to find in the document clear indications on which to found this inference. The appellants would prefer Dixon, J.'s view on this preliminary point, though, of course, challenging his final conclusion. On this view the length of notice required would be associated with the obligation of the Government to provide the money on the due date at any of the places named and not with the existence of the option itself. In other words, if the debenture-holder does not give due notice, he cannot require payment on the due date, but he does not lose his right to require payment at the place named by him when reasonable notice (which may be assumed to be six months' notice) has been given and expired. But even so, this interpretation will not avail the appellants unless it is followed by the conclusion that their claim to be paid in London involves the right to receive English currency. The question which will decide the appeal is whether, even if the claim to be paid in London was good, the appellants became entitled to be paid in due course in English currency in London the nominal amount of their stock or only the equivalent of that amount of Australian currency. For brevity, these alternatives will be referred to as payment in English currency (or pounds) and payment in Australian currency (or pounds).

At the outset it must be determined whether in the year 1895, when the original debentures were issued, the word "sterling" in connexion with pound denoted the currency of England alone, or, alternatively, the currency of England rather than that of Queensland. For even on this point there has been some conflict of opinion in the High Court, and, as their Lordships venture to think, some confusion arising from the speeches of some of the noble and learned Lords who took part in the decision of *Adelaide Electric Supply Co. Ld.* v. *Prudential Assurance Co. Ld.* (29). In the year 1895 such a question, if asked, would have appeared otiose. Alike in London and in Brisbane, the pound was the pound sterling, and the unit of account was properly denominated by either name. As Starke, J., said in the present case: "Before fluctuations in exchange occurred in the value of the "currencies of England and Australia it was not unusual in com-"mercial documents operating within Australia, e.g., cheques, "to find the obligation expressed in pounds sterling for that was "the unit of account in Australia" (30).

It is therefore, in their Lordships' opinion, impossible to infer from the mere use of the word "sterling" in conjunction with the word "pound" in a document of the year 1895, whether it be a contract between Brisbane merchants or a debenture issued by the Queensland Government, that the currency of England rather than that of Queensland was intended. It is significant that, when at a later date the values of the English and the Queensland (or, more properly, the Australian) pound diverged so that convenience required that the units of account should be differently described, the word sterling was appropriated to the English pound and for greater clarity the symbols *El.* and *Al.* were used in cases in which confusion might arise. But in 1895 this was not so and, as already observed, the inquiry what was the substantial obligation created by the debentures is not to be concluded by pointing to the use of the word "sterling".

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(29) [1934] A. C. 122.

(30) 75 C. L. R. 612.

The question, then, is, what, on the true construction of the debenture of 1895 according to its proper law, is intended by the use of the words therein "pounds sterling"? This is a question which must be determined as at the date of its issue. "It is as at the date of the contract that it must be decided "what currency is meant by the contract as the currency or "measure of value in which the contract obligation is to be "discharged": see *Auckland Corporation* v. *Alliance Assurance Co.* (31).

It appears to their Lordships that in the consideration of this question too much emphasis should not be laid on the fact that the money of account of Queensland and England was the same in 1895. It was undoubtedly similar at that date, and before and after that date, in the sense that the same nomenclature, pounds, shillings and pence, was used to describe its units of value. In other respects too, though not in all respects, the monetary systems were the same in the two countries. But by 1895 Queensland had for nearly forty years been separated from New South Wales and had been a self-governing colony with power to make laws for its own peace, order and good government. The power to determine what is lawful money of a country is a power exercisable by the legislature of such a country, and that which was lawful money in the self-governing Colony of Queensland in 1895 was lawful money by virtue of the law of Queensland.

Its origin may be sought in the history of the relations between Queensland, or at an earlier date New South Wales, on the one hand and the Crown or the Imperial Parliament on the other. But its existence and validity in 1895 rested (apart from any question arising under the Colonial Laws Validity Act) on the inherent law-making power of the Queensland legislature. It is worth while to pursue this question, which is in the background of the present appeal; for, as their Lordships venture to think,

(31) [1937] A. C. 587, 603.

it may not have been sufficiently present to the minds of the judges who have considered similar questions in earlier cases.

Leaving aside the vital distinction between the two monetary systems in that they depend on different law-making powers, their Lordships think that the identity (or, as it were better said to avoid confusion, the similarity) of the two systems can be over-stressed. For, while it is true enough, as already stated, that the money of account, in the sense of the denomination of the units of account, was the same in New South Wales and in England, yet the money of payment, by which the obligation to pay so many units of the money of account could be discharged, was by no means immutable. In England the unit of account has been from Anglo-Saxon times until today the pound, dignified at an early date by the addition of the word " sterling ", but the money of payment by which a debt of a pound could be discharged has suffered changes innumerable. Coins of silver or of gold whose names are now almost forgotten have passed current and been legal tender at different periods. So, too, in New South Wales the early settlers took with them the money of account which they had known, but from the date of the first settlement metallic coin was scarce, particularly that which was current in England, and the history of the currency of the Colony, including as it extended northwards the territory which afterwards became the Colony of Queensland, is studded with johannas, Spanish dollars, ducats and other exotic coins. It will illustrate the divergence between the monetary systems of England and the Colony if reference is made to but one of many proclamations made by the Governor of New South Wales, namely, that of November 19, 1800, by which he attached a rate at which each of these, and many other coins, should be considered legal tender in all payments or transactions in the Colony.

The changes which were effected first by the attempt to drive out the Spanish dollar and promote the circulation of the sterling money of Great Britain, then by the discovery of gold in Australia and the establishment of branches of the Royal Mint first at Sydney and then at Melbourne, by Acts of the Imperial Parliament, notably, perhaps, 26 & 27 Vict. c. 74, and 29 & 30 Vict. c. 65, and proclamations made thereunder, and by Acts, too, of the New South Wales legislature of 1854 and 1855, make an intricate story into which it is not necessary to delve. Undoubtedly the result was a gradual assimilation of the monetary systems so that in 1895 not only the money of account but also the money of payment was substantially the same in both countries, yet not entirely the same, for the Treasury Notes Acts of Queensland (30 Vict. No. 11, and 56 Vict. No. 37), to which Starke, J., refers in his judgment, show that the self-governing Colony of Queensland not only could, but did, as it though fit, regulate its own monetary system.

This was the position when, under the authority of the Government Loan Act, 1894, of the Colony of Queensland, the Governor-in-Council raised the loan and issued the debentures which are the subject of this appeal, and it is with this background that the nature of the obligation incurred by the Government of Queensland must be considered.

The question can be posed in this way. The facts being that, though there were in a real sense two monetary systems, the money of account was the same and the money of payment substantially the same in the two countries, what meaning is to be attributed to the use by the legislature and executive authority of Queensland of the words "pound" and "sterling" in a Queensland Act and an instrument made thereunder? Necessarily the question is a somewhat artificial one; for it is safe to assume that a divergence in the value of the Queensland pound and the English pound was in the contemplation of nobody. But this at least seems clear, that, if no such divergence was thought of, it cannot have been intended that the debenture-holder should obtain a different measure of value, or the Queensland Government be placed under a different liability, according to the place of payment; in other words, it is clear that the same substantial obligation was imposed on the Queensland Government whatever the place chosen for payment, the choice being given to the debenture-holder purely as a matter of convenience. The position is wholly different from that which arises where the creditor is expressly given an option not only as to the place of payment but also as to the currency in which it shall be made, and is perhaps given the further protection of the familiar gold clause.

The conclusion to which, as a matter of construction, their Lordships come, that the substantial obligation under the debenture is the same whatever the place of payment, clears the way to a solution of the whole problem. It has been urged that, if London is chosen as the place of payment, then English law as the lex loci solutionis governs the contract and determines the measure of the obligation. But this contention cannot be accepted. The mode of performance of the obligation may, and probably will, be determined by English law; the substance of the obligation must be determined by the proper law of the contract, i.e., the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion. In the consideration of the latter question, what is the proper law of the contract, and therefore what is the substance of the obligation created by it, it is a factor, and sometimes a decisive one, that a particular place is chosen for performance.

It appears to their Lordships that it is thus that the decision in the *Adelaide* case (32) is to be explained. There was in that case considerable diversity of view on what appears to be a question of fact, namely, the identity or similarity of the English and Australian pound at different periods of their history, and it is clear that some at least of the learned Lords who heard the case found a greater degree of identity and similarity than a further examination of the facts appears to their Lordships to justify. But the decision itself can be fairly rested on the fact that under the altered articles of the Adelaide company payment of dividends on its stock was to be made in Australia only. It was therefore easy to conclude that on the true construction of the contract the place of performance determined the substance of the obligation, i.e., the currency by which the obligation was to be measured.

This appears to have been the view taken of the case by this Board in *Payne* v. *Deputy Federal Commissioner of Taxation* (33), see per Lord Russell of Killowen (34), "The actual "decision was this: that an obligation to pay a preference "dividend of (say) 5*l.*, which was originally payable in England, "but which by an alteration of the company's articles, binding "on the preference stockholder, had been made payable only "in Australia, was effectively discharged by a payment in "Australian currency although the stockholder in England "received, owing to the rate of exchange, less than 5*l.* in English "currency".

The same view of the case appears to have been taken in the *Auckland* case (35), where Lord Wright, delivering the judgment of the Board, said: "It is quite clear that the whole problem "arose because of the divergence in value of the two currencies, "and it was solved, as a question of construction, by determining "what currency, on the true construction of the contract, was "connoted by the use of the word 'pound'". It is true that in the latter case, where alternative places of payment, one of them London, were provided, it was decided that the creditor who elected to be paid in London was entitled to be paid the nominal amount of his coupon interest in English currency without any allowance for exchange. But the relevant principle had already been correctly stated in the passage just cited, and was further emphasized in a later passage of the judgment (36) where in reference to the *Adelaide* case (37) it was pointed out that the mode of performance of a contract is to be governed by the law of the place of performance but "that principle, no doubt, is "limited to matters which can fairly be described as being the "mode or method of performance, and is not to be extended so "as to change the substantive or essential conditions of the "contract". If the Board, nevertheless, found it possible to hold that as a matter of construction of the contract the nature of the substantial obligation was determined by the place of performance, that decision can only be rested on the words of the particular contract and the surrounding circumstances as the Board found them to exist.

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(32) [1934] A. C. 122.
(33) [1936] A. C. 497.
(34) Ibid. 509.
(35) [1937] A. C. 587, 604.
(36) Ibid. 606.
(37) [1934] A. C. 122.

In the present case it is clear that, if it had been provided that payment would be made in London only, that would have been an important factor in determining the substance of the obligation, though other features, not present in the *Adelaide* case (37), could not be ignored. But payment in London was only one of four alternative modes of performance, and the fact that London might be chosen as the place of payment becomes a factor of little or no weight. If the substance of the obligation is in every case the same, how can it affect the rights of one debenture-holder who elects to be paid in Melbourne that another has elected to be paid in London?

The question, then, is what is the proper law of the contract, or, to relate the general question to the particular problem, within the framework of what monetary or financial system should the instrument be construed. On the assumption that express reference is made to none, the question becomes a matter of implication to be derived from all the circumstances of the transaction. Applying this test to the present case, as was properly done in *Goldsbrough, Mort & Co. Ld.* v. *Hall* (38) (a case in which the judgments of Fullagar, J., in the Supreme Court of Victoria and of the learned judges of the High Court have been of the greatest assistance in the consideration of this appeal) their Lordships find in the circumstances overwhelming evidence that it was to the law of Queensland that the parties looked for the determination of their rights. As has been pointed out, the debentures were issued on the authority of a Queensland Act which empowered the Governor-in-Council to raise by way of loan not more than 2,000,000*l*. for the public service of the Colony. By the same Act the loan was secured on the public revenues of the Colony, and was made repayable on January 1, 1945. These circumstances must be of great, if not decisive, weight in determining what is the proper law of the contract:

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(38) [1948] V. L. R. 145; (1948–9) 78 C. L. R. 1.

see *Rex* v. *International Trustee for the Protection of Bondholders A/G* (39) and compare *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society* (40). It is not inconceivable that the legislature of a self-governing colony should authorize the raising of a loan in terms of a currency other than its own, but where it uses terms which are apt to describe its own lawful money, it must require the strongest evidence to the contrary to suppose that it intended some other money. Here there are no countervailing features except (*a*) that the lender was given a choice of payment in London, and (*b*) that the larger part of the authorized loan of 2,000,000*l*. was in fact raised in London. The weight of the first factor has already been discussed: the second is more difficult to assess. As has been pointed out by Dixon, J., no details of this transaction have been given and the history and fate of the debentures issued in London were not revealed. The safer course is to examine the contract as between the present appellants or their predecessors in title and the Government of Queensland and to disregard what must be a matter of mere speculation, whether the fact that similar debentures had been, or were to be, issued in London was a circumstance, from which an intention could fairly or reasonably be implied that the debentures issued to them in Queensland were to be repaid in anything but the lawful money of Queensland.

The expression has been used above in reference to the Queensland loan " terms which are apt to describe its own lawful " money ", and it is urged that, as they are apt also to describe the lawful money of England, the matter is carried no further. But this appears to ignore the substance of the argument. The Government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system whether or not those terms are apt to refer to another system also. It may be possible to displace that presumption, but, unless it is displaced, it prevails, and, if it prevails, then it follows that the obligation to pay will be satisfied by payment of whatever currency is by the law of Queensland valid tender for the discharge of the nominal amount of the debt: cf. the *Legal Tender* cases in the United States of America (41) and *In re Chesterman's Trusts* (42). It becomes an irrelevant consideration whether the parties ever thought that the money of account of Queensland and England might at a future date, though still bearing the same name, become disparate in value or whether in fact that divergence took place. The law of Queensland

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(39) [1937] A. C. 500, 531.
(40) [1938] A. C. 224, 238.
(41) (1871) 79 U. S. 382.
(42) [1923] 2 Ch. 466.

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governs the contract and that law determines the meaning of the word " pound ".

Coming to this conclusion as to the substance of the obligation undertaken by the Queensland Government, their Lordships think it necessary in regard to the subsidiary claim by the appellants to interest to say no more than that that claim has in the circumstances no validity. They will assume, without deciding the question, that the court had in this case a discretionary power to award interest, but on this assumption they entertain no doubt that the discretion was rightly exercised in refusing to do so.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

Solicitors: *Torr & Co.; Coward, Chance & Co.*

LANGFORD PROPERTY CO. LD. . . . . APPELLANT;

AND

BATTEN . . . . RESPONDENT.

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July 7, 11, 12;
Nov. 16.

~~*Distinguished.* FEYEREISEL v. TURNIDGE [1952] 1 Q.B. 29~~

Distinguished. FEYEREISEL v. TURNIDGE [1952] 2 Q.B. 29

Landlord and tenant—Rent restriction—Flat let alone—Subsequently let with garage as separate dwelling—Standard rent—Effect of letting with garage—Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 3.

A flat in London of a rateable value of 56*l.*, which became controlled by the Rent and Mortgage Interest Restrictions Act, 1939, and was then let at a rent of 135*l.* a year, was in 1946 let to another tenant together with a garage of a rateable value of £6 at a rent of 175*l.* a year rising to 185*l.*, it being agreed that the premises were entire and indivisible. The garage was previously let separately to a different tenant at a rent of 13*l.* a year.

Held (*per* Lord Porter, Lord Oaksey, Lord Normand and Lord Radcliffe; Lord Goddard dissenting) that the second letting of the flat with the garage was a new letting of a new dwelling-house within the meaning of the Rent Restriction Acts, attracting a new standard rent, since the county court judge had found upon adequate evidence that there was a substantial difference between the premises

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* *Present*: LORD PORTER, LORD GODDARD, LORD NORMAND, LORD OAKSEY and LORD RADCLIFFE.

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comprised in the two lettings, and s. 3, sub-s. 3, of the Act of 1939 did not have the effect of identifying them.

The question whether the premises under the new letting were to be regarded as the same entity as those under the old letting was for the judge to determine.

Vaughan v. *Shaw*, [1945] K. B. 400, and *Chinnery-Haldane* v. *Sinclair*, 1927 S. C. 562, approved.

Hemns v. *Wheeler*, [1948] 2 K. B. 61, explained.

Decision of the Court of Appeal, (1949) 65 T. L. R. 577, reversed.

APPEAL from the Court of Appeal (Bucknill, Cohen and Asquith, L.JJ.).

The facts stated by LORD PORTER were as follows:—

The appellants, the landlords, who owned a large block of flats known as "The Woodlands", Beulah Hill, London, S.E.19, took out a summons in the Croydon County Court on January 29, 1949, asking that the standard rent of flat No. 2 and garage No. 7, which were then occupied by the respondent, the tenant, might be determined by that court, claiming as landlords that the rent was 185*l*. per annum whereas the tenant contended that it was 135*l*. only. On the trial of the summons the learned county court judge found for the tenant and the Court of Appeal upheld his judgment. The landlords appealed to the House of Lords.

The facts as found by the county court judge were tabulated in the cases of the parties in the present appeal and were not in dispute. He found: "(a) as a fact that flat No. 2 was not "controlled by the Rent Acts before September 1, 1939, but "became controlled by the Act of 1939; (b) as a fact that on "September 1, 1939, flat No. 2 was let alone as a flat, and "garage No. 7 existed as a garage with a rateable value of "6*l*. per annum and was not let with flat No. 2; (c) as a fact "that garage No. 7 had been added to flat No. 2 and by the "lease of January 16, 1946, the [landlords] had let to the "[tenant] the premises comprising garage No. 7 with flat No. 2 "as entire and indivisible; (d) as a fact that such addition of "the garage No. 7 was totally unconnected with any structural "alterations to or improvements of the original dwelling-house "constituted by the letting of flat No. 2 alone without the "garage; (e) as a fact the inclusion of the garage No. 7 in the "letting of flat No. 2 does not represent a trifling accession "to the flat, that the flat occupies from 600–700 square feet and "the garage an area of 140–150 square feet, and that the garage "was let in 1939 at a rent of 13*l*. per annum and had a rateable "value of 6*l*. per annum; (f) that were it a pure question of "fact it would seem difficult to say that a flat plus a garage "is the same thing as a flat without a garage, and that on this "assumption, i.e., that there has been a change of identity,

" the standard rent of the premises comprising flat No. 2 and " garage No. 7 would be fixed at 185*l*. per annum as the rent " under the first letting after September 1, 1939, of the new " dwelling-house comprising the flat plus garage and not at " 135*l*. the rent under the letting of the flat alone on September " 1, 1939; (g) that at the end of the war the [landlords] adopted " a policy of compelling prospective tenants of flats to accept " the inclusion of a garage in the demised premises whether the " tenants needed or desired the garage or not . . . for the purpose " of establishing, if possible, an increased standard rent in respect " of their flats ".

He went on to express the opinion that: " (a) The view that " the content of the new tenancy of the flat plus garage is not " identical with the content of that tenancy of the flat alone " without garage is supported by the decisions in the Court of " Appeal in *R. & P. Properties Ld.* v. *Baldwin* (1), and *Vaughan* " v. *Shaw* (2); (b) that as a matter of law by applying the pro- " visions of s. 3, sub-s. 3, of the Act of 1939 to the fact that " garage No. 7 is let with flat No. 2 the garage is therefore to be " treated as part of the flat and that it is notionally part of " the flat, and its accession to the flat cannot alter the standard " rent of the flat as fixed by the letting of the flat alone in " September, 1939, and that this literal interpretation of the " statute was acted upon in *Hemns* v. *Wheeler* (3), where the " analogous provisions of s. 12, sub-s. 2, of the Increase of " Rent and Mortgage Interest (Restrictions) Act, 1920, were " considered; (c) that for the reasons given in [the preceding] " paragraph [(b)] the standard rent of 135*l*. of flat No. 2 fixed " by the letting in September, 1930, of flat No. 2 alone was also " the standard rent of the premises comprised in the letting of " flat No. 2 plus garage No. 7 ".

The flat alone was let at a rent of 135*l*. per annum on September 1, 1939, and was then rated at 56*l*. and accordingly came under the control of the provisions contained in the Rent and Mortgage Interest Restrictions Act, 1939. It became vacant shortly before January 16, 1946, and was then leased to the respondent tenant with a garage at a rent of 175*l*. rising to 185*l*., for a term of three years beginning on February 1, 1946. If, then, the standard rent was to be calculated upon the rent payable for the flat alone on September 1, 1939, it was limited to 135*l*.; if, on the other hand, January 16, 1946, was the appropriate date and the composite entity of flat and garage was considered to have then been let for the first time, it was 185*l*.

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(1) [1939] 1 K. B. 461.
(2) [1945] K. B. 400.
(3) [1948] 2 K. B. 61.

The lease of January 16, 1946, contained in cl. 13 the provision that: " It is hereby mutually agreed by and between the parties " hereto that the said premises are entire and indivisible and in " the event of the tenancy hereby created being continued after " the expiration of the term or of the tenant remaining in possession by virtue of the Rent and Mortgage Interest Restrictions " Acts or other statutory power any such extension shall be on " the terms and condition that the said premises are entire and " indivisible ".

Whether the standard rent was to be fixed at 135*l*. or at 185*l*., the premises were admittedly within the scope of the Rent Restriction Acts, and at the expiry of his lease the tenant was entitled to and did hold over as a statutory tenant.

The landlords began similar proceedings in respect of premises comprising flats and garages let respectively to five other tenants in the block. They appealed to the Court of Appeal in each of the six cases but only prosecuted the present appeal to the House of Lords, the five other cases being stayed.

Sir Arthur Comyns Carr, K.C., *Heathcote-Williams, K.C.*, and *Plume* for the appellant landlords. The effect of s. 3, sub-s. 3, of the Act of 1939 is not to make the letting as a separate dwelling of the flat together with the garage the same as the letting of the flat alone as a separate dwelling. Nor is its effect that the standard rent of the dwelling-house comprising flat plus garage is the same as that of the flat without the garage. This sub-section replaced s. 12, sub-s. 2 (iii) of the Act of 1920. Both were concerned only with what premises are and what premises are not within the Acts. They are concerned not with the standard rent but with the premises to which the Acts apply, and are so expressed. It is not correct, as the tenant's contention suggests, that the garage should be treated not only as being part of the dwelling-house now but as having been part of it formerly at the time when they were not let together. Under s. 3, sub-s. 3, of the Act of 1939, where it applies, the added land or premises must be treated as having always been part of the dwelling-house. The " land and premises " let together with a dwelling-house which are to " be treated as part of the " dwelling-house " under s. 3, sub-s. 3, must be taken to include living accommodation: see the first part of the sub-section.

The standard rent of the premises comprising the flat plus the garage cannot be fixed by reference to a previous letting of a part only of those premises, viz., the flat alone. The premises comprising the flat and garage let in the same letting as a separate dwelling in 1946 were different in identity from the flat let alone as a separate dwelling in September, 1939. The flat was vacant when the 1946 letting began and that letting was only created on the signing of the tenancy of the present tenant. Though if the dwelling-house had been let in the same condition as previously no doubt the standard rent of 135*l*. would have applied, this was not the case. The question is: was it the thing which had been let in 1939? The answer is that as a whole it was not. What was let in 1946 was then let for the first time. *Vaughan* v. *Shaw* (4), and *R. & P. Properties Ld.* v. *Baldwin* (5), were rightly decided. *Chinnery-Haldane* v. *Sinclair* (6), is precisely and exactly in point, and *Veale* v. *Cabezas* (7) is also relied on. These cases should be followed in preference to *Hemns* v. *Wheeler* (8), which is the beginning of this problem and which was wrongly decided.

Phillips v. *Barnett* (9) was decided on different grounds and so is not helpful on this point; nor is *Prout* v. *Hunter* (10). See also *Rider* v. *Rollit* (11), *Langford Property Co. Ld.* v. *Sommerfeld* (12), *Pender* v. *Reid* (13), *Stanton* v. *Laws* (14), *Solle* v. *Butcher* (15), *Asher* v. *Seaford Court Estates Ld.* (16), *Langford Property Co. Ld.* v. *Goldrich* (17), *Whitty* v. *Scott-Russell* (18), *Read* v. *Goater* (19), and the Landlord and Tenant (Rent Control) Act, 1949.

Heathcote-Williams, K.C., following. Even though the total rateable value of the property comprised in the original letting plus the additional property comprised in the second letting is still within the limits prescribed by the Rent Restriction Acts, it does not follow that the second letting is a letting of the same dwelling-house and that the standard rent must be the same. The ascertainment of the standard rent (which depends on the Acts and on the actions of the parties) is to be distinguished from the ascertainment of the rateable value (which depends on the rating list). The object of s. 3, sub-s. 3, of the Act of 1939 is to extend the application of the Acts to the tenant in his home, although the subject-matter of the tenancy may not be confined to the dwelling-house. It does not affect the other provisions of the Acts. [He referred to *Whitty* v. *Scott-Russell* (20), *Wolfe* v. *Hogan* (21), *Ford* v. *Langford* (22), and s. 7, sub-s. 1, of the Act of 1938.]

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(4) [1945] K. B. 400.
(5) [1939] 1 K. B. 461.
(6) 1927 S. C. 562.
(7) [1921] W. N. 311.
(8) [1948] 2 K. B. 61.
(9) [1922] 1 K. B. 222.
(10) [1924] 2 K. B. 736.
(11) (1920) 36 T. L. R. 687.
(12) [1948] W. N. 287.
(13) 1948 S. C. 381.
(14) [1934] W. N. 193.
(15) [1950] 1 K. B. 671.
(16) [1950] A. C. 508.
(17) [1949] 1 K. B. 511.
(18) [1950] 2 K. B. 32.
(19) [1921] 1 K. B. 611.
(20) [1950] 2 K. B. 32, 41–2.
(21) [1949] 2 K. B. 194, 200.
(22) [1949] L. J. R. 586.

Vester and *Megarry* for the respondent tenant. A set of circumstances such as this was specifically provided for by s. 12, sub-s. 2 of the Act of 1920, and by s. 3, sub-s. 3, of the Act of 1939, which now governs the case. Under this subsection the garage falls to be treated as part of the flat. Its effect is that, for the purposes of the Acts, premises let together with a dwelling-house, to which they apply, as an adjunct to it are to be treated as part of it. The dwelling let in 1946 is the same dwelling as that let in 1939. Authorities relevant to the question of change of identity are: *Phillips* v. *Barnett* (23), *Sinclair* v. *Powell* (24), *Marchbank* v. *Campbell* (25), *Stockham* v. *Easton* (26), and *Shannon* v. *McMahon* (27). Without physical alteration of the dwelling-house there can be no change of identity; it has never been held that there can be. The Acts are primarily concerned with dwelling-houses, not with premises which may be let with them: their object is to protect homes. By s. 3, sub-s. 3, there is postulated the continued existence of the dwelling-house for the purposes of the Acts, and not its destruction, viz., its continued existence from a terminus earlier than the accession of the additional land or premises at the time of the second letting. The sub-section also postulates the continued existence of the dwelling-house which existed immediately before that letting. Change of identity involves destruction and the creation of something new.

It is the policy of the Acts to ignore small accretions of land or premises to a dwelling-house in ascertaining the identity of a dwelling-house for the purposes of the Acts. The principles laid down in *Hemns* v. *Wheeler* (28) are correct and applicable here. These small accretions should not be used as a device to increase the standard rent. The sub-section, as construed by the landlords here, would enable landlords to evade the Acts by adding small pieces of land or premises to houses to which a standard rent has attached. If the tenant's construction were rejected, it would knock a considerable hole in the Acts, since it continues the protection afforded by the Acts. *Pender* v. *Reid* (29) casts light on the position of the whole section. Its effect is that the judge in each case must decide whether the land is let with the house or the house is let with the land. There is to be noted the curious change of order in the wording of s. 3, sub-s. 3, as first "any land or premises let together "with a dwelling-house", and then the opposite. It indicates an intentional distinction on the part of the draftsman. It is also possible that the rateable value of the conjoint letting may take the premises out of the Acts. [He also referred to ss. 11 and 12, sub-s. 9, of the Act of 1920 and s. 7, sub-s. 1, of the Act of 1939.]

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(23) [1922] 1 K. B. 222.
(24) [1922] 1 K. B. 393.
(25) [1923] 1 K. B. 245.
(26) [1924] 1 K. B. 52.
(27) [1945] I. R. 327.
(28) [1948] 2 K. B. 61, 66.
(29) 1948 S. C. 381.

Megarry following. As to the hypothetical case of a cottage let with 1,000 acres of land, the solution is to be found in *Pender* v. *Reid* (29). The question to be decided is whether the land is let with the house or the house with the land. As to s. 12, sub-s. 6, of the Act of 1920, it has no substantial effect on this case and it has never been found to have any function. Dealing with a similar provision in the Irish Rent Restriction Acts (s. 3, sub-s. 4, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1923), Black, J., at p. vi of his foreword to Coghlan's Law of Rent Restriction said: " Counsel have many " times invoked it but there seems to be no recorded instance " of their having done so successfully. Its only practical effect " appears to have been to waste time in abortive discussion ". In England the sub-section has been called enigmatic and if any meaning were given to it now it would be for the first time.

These Acts were not drafted in terms of conveyancing and no possible construction of them escapes anomalies. Denning, L.J.'s observations in *Solle* v. *Butcher* (30) are in accordance with the wide meaning given to the phrase " transfer . . . of any burden " in *Asher* v. *Seaford Court Estates Ld.* (31), and suggest that a generous interpretation should be given to s. 3, sub-s. 3, in the present case.

If the landlords had tried to achieve the result at which they are aiming by a separate letting of the garage, refusing to let the flat unless the tenant also took a tenancy of the garage, they would have run the risk of falling within the premium provisions; and even if there had been separate agreements the garage might still have been held to be " let together with " the flat: see *per* MacKinnon, L.J., in *Mann* v. *Merrill* (32). The question is whether or not there has been a change of the identity of the dwelling-house.

The landlords have contended that the words " treated as " part of the dwelling-house " must, on the tenant's argument, mean that the added land is to be treated as always having been part of the dwelling-house. That is not so: the tenant is not claiming any retrospective effect for s. 3, sub-s. 3.

It has been suggested that because the identity of the premises is determined by contract the standard rent is also determined by contract. But that is putting the matter in an elliptical form. The standard rent is not settled by contract between

(29) 1948 S. C. 381.
(30) [1950] 1 K. B. 671.
(31) [1950] A. C. 508.
(32) (1945) 114 L. J. (K. B.) 406, 408.

the parties, for they cannot by contract make the Act operate in a way different from that which its terms provide.

It was further suggested that in construing the second part of s. 3, sub-s. 3, the first part of it can be invoked to show that "premises" include living accommodation. But in the second part "land or premises" cannot include "dwelling-house" because the two are used in apposition. "Land or premises" must be other than the "dwelling-house". If one tests the matter by substituting "dwelling-house" for "land or "premises", the sub-section makes nonsense.

As to change of identity, in no case in England or Scotland (or, so far as can be ascertained, in overseas jurisdictions) has it been held that anything but structural alteration will effect a change of identity, save in *Chinnery-Haldane* v. *Sinclair* (33). To say that a dwelling-house has lost its identity when it is physically unchanged is a misuse of words. In some of the earlier cases there was a suggestion that merely to use the premises for purposes outside the contemplation of the Acts amounted to a change of identity, but that was disposed of by *Mitchell* v. *Barnes* (34).

As to apportionment, see *Rice* v. *Capital & Provincial Property Trust Ld.* (35). The Landlord and Tenant (Rent Control) Act, 1949, s. 1, was not designed to meet this sort of case. On *Hemns* v. *Wheeler* (36) it would not apply. *Read* v. *Goater* (37), so far as it goes, helps the tenant. It was approved in *Whitty* v. *Scott-Russell* (38). *R. & P. Properties Ld.* v. *Baldwin* (39), and *Vaughan* v. *Shaw* (40) should not be preferred to *Hemns* v. *Wheeler* (36). There is no conflict between them: they are distinguishable.

Sir Arthur Comyns Carr, K.C., in reply. *Veale* v. *Cabezas* (41), *R. & P. Properties Ld.* v. *Baldwin* (39), and *Vaughan* v. *Shaw* (40), were rightly decided. In the former case there was no structural change and yet there was held to be a change of identity. As to *Pender* v. *Reid* (42), the landlords are not concerned to argue whether or not it was rightly decided. It is hard to reconcile with *Vickery* v. *Martin* (43). It is the tenant and not the landlords who must place reliance on s. 3, sub-s. 3, since but for that there could be no doubt that what was now let was a separate entity from what was let in 1939. The second letting was not the same letting as before and it was then that the standard rent was fixed. However little land is added, provided it is not de minimis, the addition will take the letting out of the Act. Possible anomalies do not affect the matter. On any construction of the sub-section there must be anomalies.

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(33) 1927 S. C. 562.
(34) [1950] 1 K. B. 448.
(35) [1950] 2 K. B. 481.
(36) [1948] 2 K. B. 61.
(37) [1921] 1 K. B. 611.
(38) [1950] 2 K. B. 32.
(39) [1939] 1 K. B. 461.
(40) [1945] K. B. 400.
(41) [1921] W. N. 311.
(42) 1948 S. C. 381.
(43) [1944] K. B. 679.

Their Lordships took time for consideration.

Nov. 16. LORD PORTER. My Lords, this case raises once again a question upon the construction of the difficult and elusive wording of the Rent Restriction Acts. Whether it will ever be possible to consolidate and redraft their provisions I do not know, but the difficulty to which their language gives rise undoubtedly calls for their reconsideration.

The sole question for your Lordships is whether the standard rent is 135*l*. or 185*l*., but the matter is of some importance to the appellants as they have let at least six flats with garages to which similar considerations apply and equally may affect a large number of prospective tenants of this and similar blocks of flats who may be compelled to pay an increased standard rent in order to obtain the accommodation which they require.

A flat with a garage is, as the appellants maintain, a different entity from a flat without a garage and therefore if the Acts contained no special provision dealing with the matter the respondent's contention is wrong. But, says the respondent, the Acts have specifically provided for such an incident first in s. 12, sub-s. 2 (iii), of the Act of 1920 and now in s. 3, sub-s. 3, of the Act of 1939.

The matter had already been dealt with in s. 2, sub-s. 2, of the Act of 1915 which has now been repealed by the Act of 1920 but, as I think, has some bearing on the history and development of the principles and meaning of the Acts and I set out each of the three sub-sections in the belief that they may be of assistance to your Lordships in reaching a conclusion as to their true construction.

The sub-section in the Act of 1915 reads as follows: "This "Act shall apply to a house or part of a house let as a separate "dwelling where such letting does not include any land other "than the site of the dwelling-house and a garden or other "premises within the curtilage of the dwelling-house . . .".

And the wording of the Act of 1920 is: "for the purposes of "this Act, any land or premises let together with a house shall, "if the rateable value of the land or premises let separately "would be less than one quarter of the rateable value of the "house, be treated as part of the house, but, subject to this "provision, this Act shall not apply to a house let together with "land other than the site of the house".

Section 3, sub-s. 3, of the Act of 1939 provides: "Subject to "the provisions of para. (*a*) of the last preceding sub-section, the "application of the principal Acts, by virtue of this section, to "any dwelling-house shall not be excluded by reason only that "part of the premises is used as a shop or office or for business, "trade or professional purposes; and for the purposes of the "Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as "amended by virtue of this section, any land or premises let "together with a dwelling-house shall, unless the land or "premises so let consists or consist of agricultural land exceed-"ing two acres in extent, be treated as part of the dwelling-"house; but, save as aforesaid, the principal Acts shall not, "by virtue of this section, apply to any dwelling-house let "together with land other than the site of the dwelling-house".

My Lords, as I see it, s. 2, sub-s. 2, of the Act of 1915 was concerned only with defining what was included in the term "dwelling-house" for the purpose of that Act. If it embraced more than its garden or curtilage it was not subject to the mischief of the Act. If more was let the premises were not the subject of control. That Act was not dealing with a case where some addition was made to the premises which were let—indeed if the house came into the landlord's hands and was relet as one entity with a portion of land which comprised more than a garden or curtilage it was no longer subject to the provisions of the Act. When, in 1920, the question of what restrictions were to be imposed on landlords against increasing the rent of houses let at or below a prescribed figure was considered, it appears to have been found that the definition of "dwelling-"house" was too narrowly drawn and that expression was therefore extended to include not only the curtilage but any land let with the house provided its rateable value was not more than one-quarter of the rateable value of the house with which it was let. Again, however, the sub-section, in my view, was not framed to deal with a case where the extent of the land let with the house was subsequently increased to a substantial extent. It was only enacted for the purpose of determining whether the premises as originally let consisted of a house together with land of less value than a quarter of the house's value or whether the land so let was of greater value. In the former case the premises were a dwelling-house within the meaning attributed to that expression by the Act: in the latter case, not.

The Act of 1939 was in general an enlargement in scope of the premises to which the Acts applied and extended the time during which they were to remain in force. The definition of a dwelling-house contained in the former Acts was felt to exclude premises which should be included and s. 3, sub-s. 3, was enacted to widen the protection given. Under that sub-section any land (except a certain quantity of agricultural land which is immaterial to the question at issue) let with the dwelling-house forms part of the dwelling-house and the only question is whether the rateable value of the combined entity is less than or exceeds the figures prescribed in s. 3, sub-s. 1, of the Act. Section 3, sub-s. 2, it is true, excludes certain premises from the control of the Act even if their value is less than the stipulated figure but to my mind has no further bearing upon the topic under discussion. If, then, a house is let together with any quantity of land and the total rateable value is under the figure prescribed for the locality in which it is situated, the house and land is within the mischief of the Acts. But it does not follow, if a house of a less value than the prescribed limit is let alone, and afterwards possession is recovered and the house is subsequently let with the addition of a piece of land of substantial rateable value, that it remains the same dwelling-house, even though the total rateable value of house and land is less than 75*l*. For example—Suppose a house rated at 30*l*. is let to one tenant but afterwards is handed back to the landlords and is thereafter let to another tenant together with land rated at 45*l*., the provisions of s. 3, sub-s. 3, do not, in my opinion, necessarily constitute the house and land the same dwelling-house as the premises originally let.

Land let with the dwelling-house, it is true, must be treated as part of the dwelling-house with which it is let, but this does not mean that a house and land is the same thing as the house without the land. To my mind the provision is a protection for the landlord as well as the tenant since it prevents the latter from demanding that the rateable value of house and land should be separated one from the other and claiming that if the proportion attributed to the house is less than the prescribed figure the house is a protected dwelling though the rateable value of the total premises let far exceeds that figure.

Whether the new letting is to be regarded as the same entity as the old is a question for the county court judge. I would only add that there must be a substantial change between the premises formerly let and those subsequently the subject of a letting. A mere small or incidental change is not enough. But in the present instance the learned county court judge has said: " Although I felt impelled to decide in the tenant's favour for " reasons which I shall state later it is only right to say that I " am satisfied that the inclusion in each tenancy of a garage " does not represent a trifling accession to the flat. Each flat " occupies from 600 to 700 square feet. The garages were let "independently in 1939 at rents varying between 19*l*. 10*s*. and "10*l*. They were and are still separately rated, at 6*l*. a year, "and they occupy areas of 140 to 150 square feet in each case. "Certainly at first impression it would seem difficult to say— "were it a pure question of fact—that a flat plus garage is the "same thing as a flat without a garage". This, in my view, is a finding that the new premises let differ substantially from the old and so differing are not the same entity. The conclusion follows, on my interpretation of the Acts, that the flat and garage constitute a dwelling-house which differs from the flat alone and was first let on January 16, 1946, and the standard rent is 185*l*. per annum.

Like Bucknill, L.J., I find some difficulty in reconciling the reasoning of the court in *Vaughan* v. *Shaw* (44) with that in *Hemns* v. *Wheeler* (45), though unlike him I prefer the reasoning in the former case. But, actually, I doubt whether the decision reached in either case is at variance with the view I have expressed. *Vaughan's* case (44) obviously is not and it might well be held in *Hemn's* case (45) that there had been no substantial change of entity As Tucker, L.J., said (46): "I "think that the policy of the Acts is, in effect, to ignore the "existence of these small plots of land and added premises in "ascertaining what is the dwelling-house". The result of that case, therefore, might be unchanged even if the opinion I have expressed had been followed, though no doubt the reasoning by which that result was reached was arrived at upon the ground, which I do not accept, that no addition to the premises originally let took the dwelling-house outside the protection of the Acts unless the total rateable value exceeded the prescribed limit.

As I view it, *Chinnery-Haldane* v. *Sinclair* (47) was rightly decided and took the correct view of the object and effect of s. 12, sub-s. 2, of the Act of 1920, an object and purpose which have not been altered by the change of wording adopted in s. 3, sub-s. 3, of the Act of 1939. It is true that that decision dealt with the question whether a letting with land of a value greater than one-quarter of the value of the dwelling-house, following a letting of the same dwelling-house with land of less value than one-quarter of the dwelling-house, altered the position so that the later letting was free from the control of the Acts: but the reason given for this result was that this letting had altered the identity of the house. And if the respondent's argument is right, I find difficulty in seeing that the fact that the rateable value of the totality let on the second occasion exceeded the limits prescribed by the Acts can make any difference. The dwelling, as he contends, is still the same dwelling and the added premises are to be treated as part of it and will still be subject to the Act. If this is the true view it must, I think, logically follow that, however large the addition, the premises with the additional land remain the same dwelling-house and have the same standard rent as the house alone. This difficulty is avoided if the question in each case is: " Is it the same entity as that " originally let or have the additional premises substantially " altered it?"

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(44) [1945] K. B. 400.
(45) [1948] 2 K. B. 61.
(46) Ibid. 66.
(47) 1927 S. C. 562.

In the course of the argument before your Lordships' House many cases decided upon the terms of this difficult and controversial section and its predecessors were quoted, but those to which I have referred are, I think, sufficient to illustrate the differences of view which have been held and the reasons for the construction which, in my opinion, the section bears.

I was at one time somewhat influenced by the fear that such a construction might take from tenants the protection which the Act was passed to afford, but I have come to the conclusion that provided a sufficiently substantial change of identity is required, no such consequence will follow. In any event, I think that the true construction of the Acts is that which I have indicated and I would allow the appeal.

LORD GODDARD. My Lords, in my opinion the construction placed by the Court of Appeal on sub-s. 3 of s. 3 of the Act of 1939 was right. Indeed, I think this is the very class of transaction which the sub-section was intended to deal with and prevent, that is to say, one in which a landlord obliges a prospective tenant of a dwelling-house, hitherto subject to a controlled rent, to take with it something for which he has neither use nor desire, the object being to extricate the house from the operation of the Acts. But as the rest of your Lordships are of a different opinion it would serve no useful purpose to burden the Law Reports, already congested with decisions on these difficult and obscurely worded Acts, by expressing my dissent at length, and I accordingly say no more than that I would dismiss the appeal.

LORD NORMAND. My Lords, I agree with the opinion of my noble and learned friend on the woolsack and I agree also with the opinion about to be delivered by my noble and learned friend Lord Radcliffe, which I have had the advantage of reading in print. To these opinions I cannot usefully add anything.

LORD OAKSEY. My Lords, I agree with the motion proposed. The question appears to me to depend on the construction of the expressions "standard rent" and "dwelling-house" in s. 12 of the Act of 1920, as amended by the Acts of 1933 and 1939. The expression dwelling-house means a house let as a separate dwelling and includes not only the house itself and its site but any land or premises let together with it unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent. I would refer on this matter to the judgment of Lord President Clyde in *Chinnery-Haldane* v. *Sinclair* (48), with which I respectfully agree. The dwelling-house, the standard rent of which has to be determined in the present case, therefore included not only the flat but the garage, and the question is when was that dwelling-house first let, to which there can in my opinion only be one answer, that it was first let on January 16, 1946.

It is argued and has been held by the Court of Appeal that the words of s. 3, sub-s. 3, of the Act of 1939, which provides that land or premises let together with a dwelling-house, unless they consist of agricultural land exceeding two acres, shall be treated as part of the dwelling-house, have the effect of making the dwelling-house let in 1946 the same dwelling-house as was let in 1939. In my opinion this sub-section and the corresponding sub-section in the Act of 1920, s. 12, sub-s. 2 (iii), define the extent of dwelling-houses to which the Act applies, but do not, and cannot in the absence of explicit language, make one dwelling-house of one extent let at one time the same as another dwelling-house of a different extent let at a different time. It has been suggested that this construction will enable landlords to evade the Acts by adding small pieces of land or premises on to houses to which a standard rent has already attached but I do not think this possibility is a sufficient reason for adopting a construction which in my opinion is not the true meaning of the words used. Moreover, I think that it may very well be that it is a question of fact whether the dwelling-houses let are in fact different. In the present case the learned county court judge appears to have found as a fact that they were different, and in my opinion he could not have found anything else upon the evidence.

I see no sound distinction between cases such as *Veale* v. *Cabezas* (49), *R. & P. Properties Ld.* v. *Baldwin* (50), and *Vaughan* v. *Shaw* (51), and the present case. The dwelling-house let is the dwelling-house contracted to be let and all the parcels that that contract contains. To say that the garage in the present case is no part of the dwelling-house let seems to me to contradict the words in the Acts which say what is deemed to

(48) 1927 S. C. 562.
(49) [1921] W. N. 311.
(50) [1939] 1 K. B. 461.
(51) [1945] K. B. 400

be the dwelling-house let and to be treated as part of that dwelling-house.

LORD RADCLIFFE. My Lords, I too agree with the motion proposed. This is a case about standard rent under the Rent Restriction Acts. The Court of Appeal have held that the standard rent of a flat that has a garage let with it is bound to be the same as the rent paid for that flat on September 1, 1939, when it was let without the garage. If that is right, the addition to the letting of a substantial item of property counts for nothing in the ascertainment of the standard rent of the whole subject so let. If the Act requires that, there is nothing more to be said: but, as a general proposition, this conclusion seems to me to be contrary to common sense and to be unfair to the landlord, and although we were warned by counsel against the folly of supposing that any construction of these Acts could escape the recognition of anomalies, I do not wish to start by going to the other extreme and by inferring that because a particular construction leads to an anomaly we have by that very fact an indication that the Acts have been correctly interpreted.

The crucial words are those contained in s. 3, sub-s. 3, of the Act of 1939. But, although those are the crucial words, the crucial question seems to me to be not so much what they mean as how they are to be applied to the ascertainment of standard rent in accordance with s. 12, sub-s. 1 (a), of the Act of 1920 as modified in respect of the relevant date by the provisions of Sch. I to the Act of 1939. I have great difficulty in seeing how there can be any room for substantial controversy as to what the words mean. On the other hand I am very conscious how little easy it is to be certain what is the right way of applying them when it comes to the question of ascertaining a standard rent.

First, then, as to what they mean. I think that the significance of this part of s. 3, sub-s. 3, can best be understood if one goes back to s. 12 of the Act of 1920 in which the words previously appeared. There are, of course, changes in the wording and arrangement in the later Act, but the changes are not due to any circumstance that bears upon the present purpose, and I have no doubt that the general meaning and effect of the material words in the Act of 1939 are the same as in the earlier Act. Now s. 12 of the Act of 1920 is a section entitled "Application and Interpretation", and it is plain that, while sub-s. 1 is devoted to supplying interpretations or definitions of phrases employed in the Act, sub-s. 2 has as its function to declare to what subjects and under what conditions the Act is to apply. The sub-section opens by stating that the Act is to apply to every house or part of a house let as a separate dwelling, if within the specified limits of rateable value, and it closes by stating that subject to what is provided by proviso (iii) the Act is not to apply to a house let together with land other than the site of the house. The basic thing therefore which is protected is the structure forming a house or part of a house and the site that it occupies. If something beyond that is also to come within the protection of the Act it must be brought within it by the operation of some positive enactment to be found between the beginning and the end of sub-s. 2. Similarly, if a structure which would be protected if let by itself is included in a letting which comprises land other than the site of the structure or premises other than the structure itself, sub-s. 2 must make plain whether the structure or the whole complex of property that is the subject of the tenancy is to be within or without the scope of the Act.

The words "for the purposes of this Act, any land or "premises let together with a house shall, if the rateable value "of the land or premises let separately would be less than one "quarter of the rateable value of the house, be treated as part "of the house" seem to me designed to do and in fact to do just what is required for the purpose that I have mentioned. They indicate that land or premises which are not intrinsically protected subjects are to be treated as part of a house which is a protected subject, if they are let with it and if their rateable value does not exceed a certain proportion of the rateable value of the house. There results, for the purposes of the Act, a kind of house which is really an artificial conception created by the Act, for it is a house of which some land or premises are to be treated as a part. I think that Tucker, L.J., accurately described the effect of these words when he said in *Hemns* v. *Wheeler* (52): "This results in a notional dwelling-house con"sisting of bricks and mortar plus land". But I can find no warrant for taking the further step of interpreting the words as meaning that the notional dwelling-house so created is to be deemed to be the same dwelling-house as would be the house without the land. It is because the Court of Appeal have given just that meaning to the words of the sub-section that I do not find it possible to agree with their judgment.

This provision has no special relevance to a case where land or premises or more land or other premises have been added to a dwelling-house that was previously a controlled house. It will apply to the tenancy so created, at any rate so long as, under the Act of 1939, the land is not more than two acres of agricultural land: but it is a mistake to regard it as designed to solve the difficulties created by a variation in the subject-matter of a tenancy. For the words are not apt to do so. Nor can I see

(52) [1948] 2 K. B. 61, 66.

on what foundation is based the observation in *Hemns* v. *Wheeler* (52) " . . . the policy of the Acts is, in effect, to ignore "the existence of these small plots of land and added premises "in ascertaining what is the dwelling-house". Since a belief in the existence of such a policy is of some importance to the respondent's argument, because it would at least make purposeful the otherwise purposeless anomaly which it supports, I must devote a moment to explaining why I do not entertain it.

My Lords, it is perhaps a little misleading to speak of "small "plots of land" in this connexion. It is not that one need strain the imagination with visions of the improbable contingency of a valuable factory being "let together with" a controlled house or by speculating what would happen if a large acreage of non-agricultural land were included in the letting of such a house. No doubt the sort of thing that was contemplated was small in extent and of no great value: a garden, a courtyard, a shed, a garage, etc. But the legislature is dealing with these things in relation to other things that are also on a small scale, small dwellings, small tenants and often, though this is sometimes ignored, small landlords, to whom a difference of even a few shillings a week in rent is not a matter of no importance. I do not think that the mere smallness of the kind of property that was contemplated can itself give any clue to the intention of the Act.

But how can it be said that the Act is so framed as to ignore the existence of such property? If on September 1, 1939, land and premises, say a garden and shed, were let together with a dwelling-house and the rateable value of the whole unit on the appropriate day exceeded the statutory limit, it seems to me plain that every part of it would be unaffected by the Act, even though the dwelling-house, if a separate unit, would have a rateable value within the limit. In this case the presence of the land and premises makes an essential difference. Or take the case of standard rent. If the same house, garden and shed were within the rateable limit and were let on September 1, 1939, the standard rent of that "dwelling-house" would be the rent then paid, not the less because part of it was attributable to the amenity provided by the shed and garden. Here again full value is given to the accessory in the operation of the Act. To ask whether if the house were subsequently let without the shed and garden, its standard rent would still be as high as the former figure is only to pose in another form the question involved in the present appeal. The respondent's argument would seem to require that it would be. But, however that may be, there is no basis for any general conception that the Act is so constructed as to treat land or premises let with a dwelling-house as if they were an inconsiderable portion of that house.

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(52) [1948] 2 K. B. 61, 66.

I conclude therefore that, while sub-s. 3 of s. 3 of the Act of 1939 certainly applies to the garage which is let together with the flat in the case that we are now considering and while its effect is to oblige us to treat the garage as a part of the flat that it is let with for all the purposes of the Act, it is not expressed in terms that call for the assumption that the flat which is deemed to have the garage as a part of it is the same flat as that which previously had no such part. In particular the sub-section is incapable of providing a statutory solution of the vexed question whether the "dwelling-house" whose standard rent is now in issue was let on September 1, 1939, or was first let on the day in January, 1946, when the respondent assumed the present tenancy.

Indeed, to ask this question in the abstract is to raise a problem that belongs more to philosophy than to law. But I do not think that it can usefully be answered by treating it as a general question of continuing identity. The right answer must be found by such guides as the scheme of the Act affords and by the marks that have been left by a settled course of judicial interpretation. So far as I can see, the Acts do not contain any explicit directions how to treat changes in the subject-matter of a tenancy which embraces a house within the Acts. Two main causes must be responsible if such changes come about. One is a physical change brought about by improvement or structural alteration of the premises. The other is an alteration of the subject-matter by including in a subsequent letting more than was previously let or, alternatively, by excluding some part formerly demised. In the first case I think it reasonably clear that the Acts do not regard mere improvement or structural alteration as effecting a change of identity for the purposes of standard rent. On the contrary, the provision of s. 2, sub-s. 1 (*a*), of the Act of 1920, which allows the landlord, by way of permitted increase of rent, a certain percentage upon the amount of his expenditure on improvements or structural alteration, shows that for the purposes of s. 12, sub-s. 1 (*a*), of the same Act the dwelling-house as improved or altered is regarded as the same dwelling-house as it was before. Some change more radical than the mere fact of improvement or structural alteration must take place before it can be said that, in effect, the dwelling-house which will then be under consideration has not been previously let.

But in the second case I can find no pointer as to what is intended by the Acts. The gap has had to be filled by judicial interpretation. Now it might have been thought that the overriding purpose of these Acts was to invest each separate dwelling that was brought within their protection at the commencing date with a special status incapable of surrender and to charge that dwelling with its existing rent as the permitted standard, regardless of whatever combinations of parcels might subsequently be effected by arrangements between landlord and tenant when new lettings took place. If such an interpretation of the general scheme of the Acts could have been extracted from them and could have been consistently applied by the courts, I am not persuaded that the result would have been unsatisfactory. Indeed, both s. 8 of the Act of 1920 and s. 9, sub-s. 1, of the Act of 1923 are aimed at making it impossible for a landlord to do the same sort of thing as the landlord achieved in this case by making the tenant take the garage, which he did not want, with the flat, which he did. But I am bound to recognize that the courts have not approached the Acts in this way and have been ready to interpret a subsequent variation in the content of a tenancy as creating a new dwelling-house for the purposes of the Acts. I think that the decisions in *Veale* v. *Cabezas* (53), *R. & P. Properties Ld.* v. *Baldwin* (54), and *Vaughan* v. *Shaw* (55) are all based on the theory that the act of parties in arranging a new letting can " destroy " the entity of a dwelling, a former letting of which had attracted a standard rent, and can create a new standard rent for the new entity which is the subject of the new letting.

If, then, there is no simple general rule that will provide the answer, I think that it is in substance a question of fact whether a dwelling-house the standard rent of which is to be ascertained is the same dwelling-house as one previously let. It would be all wrong, as it seems to me, to deduce a change of identity from some unimportant variation in the content of the tenancy. For the question is not so much whether the premises are in all respects the same, as whether the dwelling-house now in question is the same dwelling-house as before. Trivial variations—a few feet here or there—ought not to be treated as causing a change. That argument, that any variation in the parcels demised must result in law in a new dwelling-house, was advanced on behalf of the landlord in *Hemns* v. *Wheeler* (56) and was rightly rejected. I agree with what Tucker, L.J., said (57): " . . . it is, in my " view, erroneous to say that this dwelling-house was not let in " August, 1914, merely because a piece of land has been added ". But then the word " merely " has significance.

(53) [1921] W. N. 311.
(54) [1939] 1 K. B. 461.
(55) [1945] K. B. 400.
(56) [1948] 2 K. B. 61.
(57) Ibid. 67.

In this case, however, the county court judge has said that the addition of the garage to the flat is no trifling accession. I think that what he has said after that in his judgment is intended to convey that, were he to regard this as a pure question of fact, he would hold the flat with garage to be substantially a different dwelling-house from the flat alone. In fact he had so held in similar circumstances in the previous case of *Langford Property Co. Ld.* v. *Sommerfeld* (58). Either view, a change of identity or the same dwelling-house, seems to me a possible one on the facts; but if s. 3, sub-s. 3, of the Act of 1939 does not have the effect of compelling the court to assume the continued identity, as I think that it does not, the county court judge's views on a question of degree, as to which there is no absolute test, ought not to be departed from by an appellate court, if there is evidence to support them. Consequently, I think that the appeal should succeed.

My Lords, we are warned that, if the appellants' argument should succeed, much of the protection that standard rent affords to tenants of controlled houses will be lost. That is a serious consideration, although, if it were to influence our decision, we should only be allowing one injustice in order to avoid the possibility of another. But on the whole I think that the dangers anticipated may be somewhat exaggerated. Landlords may indeed find it possible in some cases to re-arrange the subjects of their tenancies, so that the standard rent of what was previously let is no longer the standard rent of the new accommodation. But there is something rather unreal in visualizing the typical landlord as a property-owner with a reserve stock of spare assets which he can add to his tenancies at will on future lettings. I doubt if a great many landlords could take advantage of such a device if they wanted to. Nor, as I see it, will it serve their purpose to make some trifling re-arrangement of the parcels. It is not the maxim "de minimis" that stands between continuing identity and a change of identity, but the fact that only a substantial variation in what is let can justify a finding that there is a new dwelling-house for the purposes of the Acts. Lastly, the Act of 1949 has now brought it about that the standard rent in such a case will no longer be what the landlord may be able to extract from the tenant's necessities but will be such as the appropriate tribunal may allow. With all this in mind, I cannot think that success in this appeal will afford landlords as a class any but a minor source of gratification.

Appeal allowed.

Solicitors. *Stikeman & Co.; R. Edler & Co.*

(58) [1948] W. N. 287.

KOFI SUNKERSETTE OBU . . . . APPELLANT;

AND

A. STRAUSS & CO. LD. . . . . . RESPONDENTS.

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Jan. 29.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

Principal and agent—Agency contract—Commission—Basis and rate left to discretion of principal—Claim for account and payment of commission—Court incompetent to grant relief claimed.

By an agreement signed by the appellant, who was the agent in West Africa of the respondent company for the purchase and shipment of rubber to the company in London, it was provided, inter alia, that "the company has agreed to remunerate my services with "a monthly sum of fifty pounds"—subsequently reduced to 20*l.*—"to cover my personal and travelling expenses. . . . A commission "is also to be paid to me by the company which I have agreed to "leave to the discretion of the company". The respondents, after the termination of the appellant's employment, having instituted proceedings against him claiming money alleged to be due from him as their agent, he entered a counterclaim for an account to be taken between them of all rubber shipped by him between specified dates, and for commission on all the rubber purchased by him for the respondents. On appeal against the dismissal of his counterclaim:—

Held, that the relief which the appellant claimed by his counterclaim was beyond the competence of any court to grant. The court could not determine the basis and rate of commission. To do so would involve not only making a new agreement for the parties, but varying the existing agreement by transferring to the court the exercise of a discretion vested in the respondents.

Way v. *Latilla*, [1937] 3 All E. R. 759, considered.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 49 of 1948) from a judgment of the West African Court of Appeal (Gold Coast Session) (December 13, 1947) which had affirmed a judgment of Smith, J., sitting as a Divisional Court at Kumasi (October 23, 1945).

In 1942, after letters and cables between the respondents, A. Strauss & Co. Ld., and the appellant, Kofi Sunkersette Obu, the latter was engaged to collect and ship rubber on the respondents' behalf. On April 19, 1943, a formal agreement was signed by the appellant, cl. 1 of which provided that he agreed to serve the respondents in the capacity of agent in the business of purchasing, manufacturing and exporting rubber in and from the Gold Coast for the account and to the order of the respondents.

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* *Present:* LORD RADCLIFFE, LORD TUCKER, SIR JOHN BEAUMONT and SIR LIONEL LEACH.

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Clause 6 provided that "the company has agreed to remunerate "my services with a monthly sum of fifty pounds to cover my "personal and travelling expenses for the time being which I "have accepted. A commission is also to be paid to me by the "company which I have agreed to leave to the discretion of "the company". Subsequently the sum of 50*l*. a month was reduced to 20*l*. a month. The employment of the appellant was terminated as from May 31, 1945.

In June, 1945, the respondents instituted the suit out of which this appeal arose, claiming, inter alia, 365*l*. 8*s*. 4*d*. as the balance due by the appellant to them in respect of moneys drawn by him for his personal account. In July, 1945, the appellant put in a counterclaim for an account to be taken between them of all rubber shipped by him to them from August, 1942, to January, 1945, inclusive, and for commission on all the rubber purchased by him for them.

Smith, J., held that the respondents were entitled to recover the 365*l*. 8*s*. 4*d*. claimed on the personal account, and he dismissed the appellant's counterclaim. That decision was affirmed by the West African Court of Appeal (Verity, C.J., Nigeria; M'Carthy, J., Gold Coast; Coussey, J., Gold Coast). The appellant now appealed.

1950. Nov. 27, 28. *Dingle Foot* and *T. O. Kellock* for the appellant. The issue arises entirely out of the appellant's counterclaim, and the Board is directly concerned to consider two matters, first, whether he is entitled to an account of the rubber which was collected and shipped by him between August, 1942, and January, 1945, inclusive, and, secondly, whether he is entitled to a commission. If he is entitled to commission he must be entitled to an account to ascertain the amount of the commission. There are a number of reported cases where the amount of the commission has not been set out in the contract, but left to be determined. There are two lines of cases: (a) those where it is left to the discretion of the principal to decide whether he should pay any commission at all; (b) cases where quite clearly the principal is under an obligation to pay something, but where the amount is left open, and it has been held that the principal must pay a reasonable amount of commission. On the documents this case falls within the second category. Although the amount of the commission was never specified, nevertheless the appellant is entitled to a reasonable sum.

He was an agent, not a servant, of the respondents, but it makes little difference what his status was, because the question whether he is entitled to an account really turns on whether on the construction of the documents he is entitled to receive a

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commission or some share of the profit, whatever that might be, over and above the amount which was paid to him, 50*l.* a month at first, and 20*l.* later. The principle is set out in Halsbury's Laws of England (2nd ed.), vol. 22, at p. 132, where it is said, " . . . but when a contract of service, which leaves the question " of remuneration to the employer, is capable of being construed " as an agreement to pay a reasonable sum for the service in " question, the servant is entitled to something in the way of " payment ". The court below has not applied its mind to that at all. It has been held in a number of cases that where provision is made for commission, but the amount is not specified, a reasonable amount should be paid: *Peacock* v. *Peacock* (1); *Taylor* v. *Brewer* (2); *Bryant* v. *Flight* (3); *Bird* v. *M'Gaheg* (4); *Roberts* v. *Smith* (5); *Loftus* v. *Roberts* (6); *Broome* v. *Speak* (7) and *Way* v. *Latilla* (8). It was said in the last-cited case that the services were not to be rendered gratuitously, and that is precisely the position here. For what is meant by " expenses ", see *Reg.* v. *Holy Trinity and St. Mary's, Hull, Governors and Guardians* (9). Although the distinction is not easy to draw in some of the above-cited cases, there is a distinction between cases where something has to be paid, no matter what, and the cases where payment depends on the will of the employer. The strongest case against the appellant is *Taylor* v. *Brewer* (2). *Loftus* v. *Roberts* (6) was relied on in the appeal court below, but it is submitted that it is not really against him, and can be distinguished from the present case. *Bryant* v. *Flight* (3) comes very near to the present case, and the facts in *Broome* v. *Speak* (7), which also supports the appellant here, are rather close to those of this case.

Not until after the agreement of April 19, 1943—in 1944—was it suggested to the appellant that the monthly sum which he was receiving was intended to cover his remuneration. It was quite clearly intended that he should receive some reward for his services over and above the amount which was paid for expenses. There is nothing in any documents which passed between the parties to show that the 50*l.* was intended to cover remuneration as well as expenses—all the documents point to the opposite conclusion. " Expenses " means just what it says, and it cannot have been the intention of the parties that the appellant should work from August, 1942, till the end of May, 1945, without receiving any reward whatsoever. He is entitled to receive something, whatever it may be, by way of commission, and it is something which will have to be decided by the trial court, and something to which the trial judge ought to have applied his mind.

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(1) (1809) 2 Camp. 44.
(2) (1813) 1 M. & S. 290.
(3) (1839) 5 M. & W. 114.
(4) (1849) 2 Car. & Kir. 707.
(5) (1859) 4 H. & N. 315, 320.
(6) (1902) 18 T. L. R. 532.
(7) [1903] 1 Ch. 586.
(8) [1937] 3 All E. R. 759, 763.
(9) (1827) 7 B. & C. 611.

Fearnley-Whittingstall, K.C., and *Patrick Easton* for the respondents. The appellant has conceded that if his claim for commission fails he has no claim for an account. It is submitted, however, that in any event, whatever may be his right to commission, he has no right to an account. An agent is only entitled to an account if the object of the account is to render clear something which is obscure: *Dinwiddie* v. *Bailey* (10); *Padwick* v. *Stanley* (11). There is nothing in the agreement to indicate on what basis commission is to be paid, and an account is not a remedy which the appellant is entitled to pursue.

On the main point—whether he is entitled to commission—the authorities are gathered together in *Broome* v. *Speak* (12). [Reference was also made to Halsbury's Laws of England (2nd ed.), vol. 1, p. 257, para. 432, and to Pollock on Contracts (13th ed.), p. 38 et seq.] There is a complete reservation of the right not to pay any commission at all on the part of the respondent company in this case. The only right which the appellant here might extract from this contract is a right to sue the employers for damages if they failed to exercise their discretion. He was paid a salary of 50*l*. a month for his services, which was to cover such personal and travelling expenses as he might incur. The word "remuneration" was used, and the payments made to him were salary and always so regarded. Further relief cannot be given here by way of quantum meruit when there is already provision for payment. In *Martin* v. *Tucker* (13) it was said that "they could not claim on a quantum meruit, because they "had chosen to tie themselves down by the express terms of "the agreement"; and see also *Lott* v. *Outhwaite* (14). In *Way* v. *Latilla* (15) Lord Atkin said that "if the parties had "proceeded on the terms of a written contract, with a material "clause that the remuneration was to be a percentage of the "gross returns, but with the figure left blank, the court could "not supply the figure".

Summing up: (i) there is no right here for an account in any circumstances. The agent knew of the matter for which he asked for the account, namely, the amount of rubber shipped, and to ask for an account of that when it was within his knowledge is a relief to which he is not entitled; (ii) so far as the account is concerned, there are so many things which could be looked to

(10) (1801) 6 Ves. 136, 141.
(11) (1852) 9 Hare 627.
(12) [1903] 1 Ch. 586.
(13) (1885) 1 T. L. R. 655.
(14) (1893) 10 T. L. R. 76.
(15) [1937] 3 All E. R. 759, 763.

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for an account on this claim that it is quite impossible to say what matters should be accounted for; (iii) an agent in any event is not entitled to an account as of right: it is only a relief to which he is entitled if it is going to clarify something which is otherwise obscure; (iv) in any event he is not entitled to commission if the employers do not think that he has earned it; (v) in any event the monthly payment was remuneration for services; (vi) as there is an express contract here there is no room for any quantum meruit.

Dingle Foot, in reply. In the cases cited the agents were asking for an account of matters within their own knowledge. But here, first, these proceedings were brought after the appellant had ceased to be employed by the respondents and no longer had the custody of the company's records in the Gold Coast; and, secondly, the sales of rubber in London, on which the profit was made, are something which could not be within his knowledge. The general rule is stated in Halsbury's Laws of England (2nd ed.), vol. 1, p. 268, para. 446.

If these services were not intended to be gratuitous something must be payable. "Remuneration" is an elastic word, and has a wider connotation than "salary": *Reg.* v. *Postmaster-General* (16). It was used in *Reg.* v. *Holy Trinity and St. Mary's, Hull, Governors and Guardians* (17), as covering only expenses.

Jan. 29. The judgment of their Lordships was delivered by Sir John Beaumont. This is an appeal from the judgment of the West African Court of Appeal (Gold Coast Session), dated December 13, 1947, dismissing, with costs, the appellant's appeal from the judgment of the Supreme Court of the Gold Coast, dated October 23, 1945, whereby the trial judge gave judgment for the plaintiffs (the present respondents) for 1,104*l*. 19*s*. 4*d*. [which included the 365*l*. 8*s*. 4*d*. claimed in respect of the personal account] and dismissed the appellant's counterclaim for accounts and commission.

At the dates material to this appeal the appellant was the agent of the respondents in West Africa for the purchase and shipment of rubber to the respondents in London. The suit out of which this appeal arises was commenced on June 19, 1945, in the Supreme Court of the Gold Coast, Ashanti, by the respondents as plaintiffs against the appellant as defendant claiming money alleged to be due from the appellant as such agent. On July 20, 1945, the appellant put in a counterclaim in the suit, which was in the following terms: "Please take notice that at

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(16) (1876) 1 Q. B. D. 658, 663.

(17) 7 B. & C. 611.

"the trial of the above-named case the defendant will counter-"claim and he hereby counterclaims against the plaintiffs for "an account to be taken between them of all rubber shipped by "the defendant to the plaintiff company in Europe from August, "1942, to January, 1945, inclusive, and for the court to order "payment of what is found due to the defendant on the taking of "the said account; and the defendant further claims commission "on all the rubber purchased by him for the plaintiff company". Why the appellant claimed an account on all rubber shipped (which would be after it had been processed) and a commission on all rubber purchased is not apparent.

At the trial oral and documentary evidence was given on behalf of both parties. A Mr. Lewis, who was a member of the firm of accountants employed by the respondents in the Gold Coast, gave evidence that he had a statement of accounts from the respondents showing a profit in London on sales of rubber shipped by the appellant of 1,553*l.* 16*s.* 0*d.*, but that the local account showed a loss of 4,954*l.* 17*s.* 11*d.*, showing a total loss of over 3,000*l.* This evidence was not challenged by the appellant when he gave evidence, though the result of the local trading was within his special knowledge. The trial judge on October 23, 1945, gave judgment for the respondents for part of the sum claimed by them and dismissed the counterclaim of the appellant.

The appellant appealed from that judgment to the West African Court of Appeal, and on December 13, 1947, the appeal was dismissed. This appeal is brought from the judgment of the West African Court of Appeal. The only part of the judgment of the West African Court of Appeal which was challenged before the Board was the dismissal of the appellant's counterclaim. The facts therefore which are relevant are those relating to the counterclaim for an account and payment of commission.

Business relations between the parties commenced in August, 1942, and at first such relations were governed by certain cables and letters. It is not necessary to refer in detail to these documents; suffice it to say that under them the appellant was to receive a payment of 50*l.* per month, and it was contemplated that he would also receive a commission to be fixed by the respondents.

Subsequently it was thought desirable that the relations between the parties should be embodied in a formal agreement, and on April 19, 1943, an agreement was signed by the appellant. By cl. 1 of that agreement the appellant agreed faithfully to serve the respondents in the capacity of agent in the business of purchasing, manufacturing and exporting rubber in and from the Gold Coast for the account and to the order of the respondents, and during the continuance of the agreement to give his time and attention to the management, conduct and superintendence of the business. Clause 6 of the agreement dealt with the remuneration of the appellant and was in the following terms: "The company has agreed to remunerate my services with a "monthly sum of fifty pounds to cover my personal and travelling "expenses for the time being which I have accepted. A commission is also to be paid to me by the company which I have "agreed to leave to the discretion of the company". Subsequently the sum of 50*l*. per month was reduced to 20*l*. per month, but nothing turns on this. The employment of the appellant was terminated as from May 31, 1945.

The question in this appeal is as to the right of the appellant to commission. The appellant points out that cl. 6 of the agreement contemplates that he is to get some remuneration by way of commission in addition to the 50*l*. per month, and he contends that as the respondents have refused to pay any commission he is entitled to a reasonable commission by way of quantum meruit for services rendered. The appellant relied on the authority of such cases as *Bryant* v. *Flight* (18) and a decision of the House of Lords in *Way* v. *Latilla* (19). Only the latter case dealt with remuneration by way of a share in business introduced, and in their Lordships' opinion the earlier cases are of no assistance to the appellant. In *Way* v. *Latilla* (19) the agent claimed that there was an agreement to give him an interest in a concession obtained by him which by custom, or on a reasonable basis, the court was asked to define as one-third. The House of Lords rejected this claim on the ground that there was no concluded contract between the parties as to the amount of the share which the agent was to receive and it was impossible for the court to complete the contract for the parties. The House, however, held that whilst there was no concluded contract as to the amount of remuneration, it was plain that there existed between the parties a contract of employment under which the agent was engaged to do work for the plaintiff in circumstances which clearly indicated that the work was not to be gratuitous, and that the agent therefore was entitled to a reasonable remuneration on the implied contract to pay him quantum meruit, and the House fixed the amount to be paid.

This case again, in their Lordships' view, does not help the appellant, and, indeed, is rather against him. The right of the appellant to remuneration is governed by cl. 6 of the agreement. The sum of 50*l*. per month was to remunerate the services of the appellant though it was to cover his personal and travelling expenses; there is therefore no question, as in *Way* v. *Latilla* (19), of the services of the appellant being rendered gratuitously.

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(18) 5 M. & W. 114.

(19) [1937] 3 All E. R. 759.

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Clause 6 does not provide for the payment of any further sum by way of additional remuneration for the services of the appellant on which a claim of quantum meruit might be founded. The only additional remuneration was to be a commission in the discretion of the respondents. The appellant claims a commission on rubber purchased or rubber shipped, but it is clear that the respondents would have to fix, not only the rate, but the basis, of the commission, and such basis might be a share of profits. The correspondence between the parties before the date of the agreement shows that it must have been in the mind of the appellant that his commission might be based on profits. In a letter from the respondents to the appellant, dated October 7, 1942, the respondents said: ". . . your interests will be fully "protected and your share of the total net profits of the entire "enterprise will be made retrospective". Again, in a letter written by the solicitors for the respondents to the appellant, dated February 2, 1943, when the solicitors were seeking from the appellant material on which to base the formal agreement which they were about to prepare, they said this: "You further "informed us that you receive a monthly remittance of 50*l.* for "expenses and that it was agreed you should share in the profits "arising from the sale of rubber but that no percentage had been "fixed; this percentage was in the company's discretion".

A commission based on profits would be rendered nugatory by the absence of profits. In their Lordships' opinion the relief which the appellant claims, namely, an account and payment of commission based on rubber purchased or shipped, is beyond the competence of any court to grant. The court cannot determine the basis and rate of the commission. To do so would involve not only making a new agreement for the parties but varying the existing agreement by transferring to the court the exercise of a discretion vested in the respondents. If the appellant is not entitled to any commission it is conceded that he cannot claim an account. For these reasons their Lordships think that the judgments of the courts in West Africa were right.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondents.

Solicitors: *A. L. Bryden & Williams; Wm. Easton & Sons.*

[HOUSE OF LORDS]

H. L. (E.)*

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Oct. 9, 10, 11, 12, 16, 17, 18, 19;
Nov. 23.

MINISTRY OF HEALTH . . . . . APPELLANT;

AND

SIMPSON AND OTHERS . . . . . . RESPONDENTS.

Administration—Distribution under invalid charitable bequest—Mistake of law—Right of next of kin to recover in equity from charities wrongly paid—Equitable claim in personam and common law action for money had and received—Statute of Limitations—Applicability—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 20.

Acting under a mistake of law the personal representatives of a testator, whose residuary disposition was invalid, distributed his residuary estate, on the footing that it was valid, among divers charitable institutions which received the payments in good faith.

Held, that, subject to the qualification that they must have first exhausted their remedy against the personal representatives, the next of kin had a direct claim in equity against those to whom the residuary estate had been wrongly distributed.

Held, further, that the action by the next of kin was "in respect "of any claim to the personal estate of a deceased person" within the meaning of s. 20 of the Limitation Act, 1939, and accordingly the period of limitation was twelve years, so that the action, being brought within that period, was not barred.

Decision of the Court of Appeal (*sub nom. In re Diplock, Diplock* v. *Wintle*) [1948] Ch. 465, affirmed.

APPEAL from the Court of Appeal (Lord Greene, M.R., Wrottesley and Evershed, L.JJ.).

The facts, stated by Lord Simonds, were as follows: On March 23, 1936, Caleb Diplock died intestate as to his residuary estate, which amounted to over 250,000*l*. He had by his will dated November 3, 1919, purported to dispose of it by directing his executors to apply it "for such charitable institution or "institutions or other charitable or benevolent object or objects "in England" as his acting executors or executor might in their or his absolute discretion select. The invalidity of this disposition was finally established by the House of Lords in the year 1944: *Chichester Diocesan Fund and Board of Finance Incorporated* v. *Simpson* (1). The proceedings in which this decision was given had been commenced on June 10, 1940, by the testator's executors by way of originating summons issued in the Chancery

(1) [1944] A. C. 341.

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

Division of the High Court of Justice, but in the meantime, on January 3, 1940, an action had been commenced in the same Division by the first three respondents to the present appeal, together with another person, claiming to be four of the next of kin of the testator, against the executors or their personal representatives, certain selected charitable institutions, which had received donations from the executors, and the Attorney-General, claiming administration of the testator's estate. In this action an order was made on April 5, 1944, by which the court approved a compromise of the claims of the plaintiffs against the executors and directed that such compromise should be binding on all persons beneficially entitled to the property of the testator. Under this order (inter alia) a sum of 15,000*l.* was to be paid by the executors to the fourth respondent to this appeal, who had been appointed judicial trustee of the testator's estate. This order was relevant to the present appeal because its admitted effect was that by it the first three respondents and all other next of kin must be deemed to have exhausted whatever remedy they had against the executors in respect of the wrongful distribution of the estate.

On July 28, 1945, the respondents issued the writ in the action in which this appeal arose. The original defendants were the President, Vice-Presidents, Treasurer and Governors of Westminster Hospital, a corporation incorporated by private Act of Parliament. This corporation was dissolved under the provisions of the National Health Service Act, 1946, and replaced by a new corporation created under that Act. It was, however, common ground between the parties that the appellant, the Ministry of Health, which was added as a defendant to the action by an order of the Court of Appeal, was under s. 6, sub-s. 1, of the same Act liable to pay any sum due in respect of the respondents' claim. By their action the respondents claimed a declaration of the liability of the defendants to refund to the estate of the testator the sum of 4,000*l.* which they had received out of that estate from the executors with interest thereon and an order for payment accordingly.

The relevant facts were not in dispute. On June 4, 1936, the Deputy Chairman of the Hospital applied to the executors for a contribution towards the fund for the erection of new buildings for the hospital. On March 20, 1937, a cheque for 4,000*l.* was sent to one of the treasurers of the hospital by or on behalf of the executors under cover of a letter which, as was now admitted, did not affect the recipient with notice of the invalidity or possible invalidity of the residuary bequest in the will. On March 23, 1937, the cheque was paid into the "Westminster Hospital Rebuilding Fund Current Account" at a branch of Barclays Bank Ld., which at the close of business on that day

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showed a credit balance of 15,268*l*. 1*s*. 10*d*. It was not until October 18, 1939, that the defendants had notice of the claim of the next of kin and already by that date all moneys to the credit of the account in question had been applied in payments relating to the erection of the new hospital buildings and the account showed a debit balance of 9,508*l*. 3*s*. 9*d*. In these circumstances it was not contended that the respondents could assert any right at law or in equity to follow or trace the sum of 4,000*l*. into assets held by the appellant. The single question to be determined in this appeal was whether the original defendants were, and the appellant now was, under a personal liability to refund to the estate of the testator the money wrongfully paid to them.

This question was answered in the negative by Wynn-Parry, J., and in the affirmative by the Court of Appeal (Lord Greene, M.R., and Evershed and Wrottesley, L.JJ.). The appellant appealed to the House of Lords.

Upjohn, K.C., *Denys Buckley* and *Dunbar* for the appellant. The executors, in the innocent but mistaken belief that they had the power to do so, made payments to several charities. It is admitted that the mistake was one of the general law and not a mistake of fact or as to the construction of the will. Neither at law nor in equity can the next of kin recover the money so paid in a direct action against the charities. Where money which belongs to A (here the next of kin) is in the hands of B (here the executors) and is wrongly paid to C (here the charities) the general law is that A cannot sue C direct in personam. There is no action at law or in equity founded on considerations of ex aequo et bono or justice between man and man to recover the money in personam merely because it would be the right and fair thing: see *Sinclair* v. *Brougham* (2). There are certain exceptions: thus if B has a right to recover from C, then A, using the machinery of equity, may make a claim directly against C. For example, if C has been guilty of fraud or if there has been a mistake of fact or a total failure of consideration the money can be recovered directly. But this exception does not apply here because B paid the money under a mistake of law, and public policy discourages actions based on ignorance of law.

Again, even where B is himself barred, A may yet be entitled to recover from C in a limited number of exceptional and special cases. There is the case where C is a trustee or occupies some fiduciary capacity to A. But it is conceded that C did not become a trustee in this case. Even if A and C are claiming under the same document (e.g., a will) and C has been wrongly paid, that does not constitute him a trustee for A. But C in this case was not in the position of a claimant under the will at all. Instead, C was a stranger to the estate and never a legatee. Even had the bequest been valid the charities would not have been in the position of legatees; none of them had any right to have the estate administered in the Chancery Division.

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(2) [1914] A. C. 398, 456.

The only other case where A can make a direct claim against C is where the common law, or equity acting by analogy to the common law, allows money to be recovered on a count of money had and received to the use of A. This may only be where the money sought to be recovered was paid under a mistake of fact. The authorities on this aspect of the case discussed in the Court of Appeal all fall within this classification.

Where unpaid creditors of the testator appear after the legatees have been paid they can compel the legatees to repay, for everyone who takes under a will knows that he takes subject to creditors' claims. Again, where payment is made to the wrong person, in the mistaken belief that he is the next of kin, and a nearer of kin is subsequently discovered, the nearer of kin can recover the estate. That is a case of pure mistake of fact. There is no case in the authorities of a mistake as to which of two known persons is next of kin; that would be a mistake of law and accordingly there could be no repayment. As between legatees one legatee can claim repayment in a case where another legatee has been overpaid because the assets were deficient at the time of payment and the executor can no longer make repayment owing to his own insolvency. It is otherwise where the deficiency of assets has arisen after payment.

The principle of equity between legatees was wrongly extended to this case by the Court of Appeal, for that principle is applicable only (i) where there has been a mistake of fact, and (ii) where there is a question of adjustment between legatees, whereas the charities here are not legatees and, even after the executors had expressed an intention of making them a gift, the gift was still imperfect. The early position with regard to the relevant principles is illustrated by *Nelthrop* v. *Hill* (3); *Grove* v. *Banson* (4); *Chamberlain* v. *Chamberlain* (5); *Noel* v. *Robinson* (6); *Anonymous* (7); *Hodges* v. *Waddington* (8); *Newman* v. *Barton* (9); *Anonymous* (10); and *Anonymous* (11).

In ordering the repayment of money paid in the course of administration the remedy which the Court of Chancery could give was circumscribed in the same way as that given by the Spiritual Court which required a legatee who was paid his legacy to give security only in a limited class of cases (a) to meet the contingency of further creditors appearing and (b) to meet the case of a deficiency of assets to pay all legacies of equal rank pari passu. The only two precedents of bonds discovered cover no other contingencies: see The Scrivener's Guide by Covert (4th ed., 1724), Vol. I, p. 334, and Burn on Ecclesiastical Law (9th ed., 1842), Vol. IV, p. 517. These bonds indicate the extent of the equity, since equity in these matters acted in imitation of the Spiritual Court and its action was coterminous with the action of that court where the bond was treated as proper protection. If the Court of Chancery have thought that something further was needed it would have insisted on more. As to the competition between the Court of Chancery and the ecclesiastical courts, see Holdsworth's History of English Law, Vol. VI, p. 652. In the present case the only appropriate form of bond would have been a bond against creditors.

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(3) (1669) 1 Ch. Cas. 135.
(4) (1669) 1 Ch. Cas. 148.
(5) (1675) 1 Ch. Cas. 256.
(6) (1682) 1 Vern. 90.
(7) (1683) 1 Vern. 162.
(8) (1683) 2 Ventris 360.
(9) (1690) 2 Vern. 205.
(10) (1718) 1 P. Wms. 495.
(11) (1738) 1 Atk. 491.

The development of the law is further illustrated by *Orr* v. *Kaines* (12); *Atkins* v. *Hill* (13); *Walcott* v. *Hill* (14); *Higgins* v. *Higgins* (15); *Gillespie* v. *Alexander* (16); and *Greig* v. *Somerville* (17), which support the conclusion that a remedy is only available where there is a mistake of fact. As for *David* v. *Frowd* (18), there was nothing to justify the Court of Appeal in fixing on the final words of the judgment to conclude that the mere receipt of money coupled with notice is sufficient to fasten on the conscience of a recipient in the position of the charities in the present case. If that were true in the administration of estates the principle must apply to every other case. The administration of assets is on the same footing as the administration of trusts. There is no logical difference. Wrongful payment by an executor under a mistake of law is no different from the case of a trustee who pays money under a mistake of law to someone who is a stranger to the trust. In order to give rise to an equity in such a case as the present there must be something positive in the conduct of the parties. Mere passive receipt is not enough. See also *Sawyer* v. *Birchmore* (19); *Davies* v. *Nicolson* (20); *Thomas* v. *Griffith* (21); *Fenwick* v. *Clarke* (22); *Peterson* v. *Peterson* (23); *Prowse* v. *Spurgin* (24); *Hilliard* v. *Fulford* (25); *Mohan* v. *Broughton* (26); *Harrison* v. *Kirk* (27);

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(12) (1751) 2 Ves. Sen. 194.
(13) (1775) 1 Cowp. 284, 287.
(14) (1788) 2 Bro. C. C. 304–5.
(15) (1832) 4 Hagg. Ecc. 242.
(16) (1826) 3 Russ. 130.
(17) (1830) 1 Russ. & M. 338.
(18) (1833) 1 My. & K. 200.
(19) (1836) 1 Keen 391, 401; (1837) 2 My & C. 611.
(20) (1858) 2 De G. & J. 693.
(21) (1860) 2 Giff. 504.
(22) (1862) 4 De G., F. & J. 240.
(23) (1866) L. R. 3 Eq. 111.
(24) (1868) L. R. 5 Eq. 99, 101.
(25) (1876) 4 Ch. D. 389.
(26) [1900] P. 56.
(27) [1904] A. C. 1.

In re Hatch (28); *In re Rivers* (29); *In re Mason* (30); *In re Blake* (31); Swinburne on Wills (7th ed., 1803), p. 376; Maxims of Equity by Robert Francis (1728), p. 12; *Bize* v. *Dickason* (32); *Bilbie* v. *Lumley* (33); *Brisbane* v. *Dacres* (34); *Wilson and M'Lellan* v. *Sinclair* (35); *Dixon* v. *Monkland Canal Co.* (36); *Baylis* v. *Bishop of London* (37); and *Sinclair* v. *Brougham* (38).

The case of the charities is particularly assisted by *Rogers* v. *Ingham* (39) and *In re Robinson* (40).

For the next of kin to succeed it is not enough for them to establish that it is right and fair that they should recover the money. The executors have no right to claim against the charities and therefore, in order to succeed, the next of kin must establish an independent right not available to the executors. The charities are not constructive trustees for the next of kin, who must establish an equity entitling them to relief. To be available that equity must cover the case where an executor has innocently paid money to a third party who had no right to it under the will. No authority can be found which expressly states so wide a proposition. The next of kin found their alleged equity on the words used in *Noel* v. *Robinson* (41) that common justice will compel the legatee to refund, and the question arises whether the House of Lords is to take words used in the seventeenth century and apply them now, although meanwhile equity and the authorities have taken a different course.

The phrase originated at a time when reporting was only starting in Chancery, and in those reports one must not take a phrase just as it stands. That was a case of legatees and a remedy available to one beneficiary against another is not available against a stranger to the estate: see *Chamberlain* v. *Chamberlain* (42). The application of this equity rests on the clear principle that creditors take before legatees and therefore a legatee, if paid, may have to refund if a creditor subsequently appears. Similarly next of kin take under a defeasible title subject to better information disclosing nearer kin. But a recipient in the position of the charities does not take with notice of any danger that the whole will may be invalid and accordingly is not in the same position as a legatee. The phrase in *Noel* v. *Robinson* (43) has never been applied outside the case of an overpaid beneficiary (one who is really a beneficiary) and a next of kin, where other next of kin came in: see Roper on Legacies (4th ed., 1847), Vol. I, c. VII, s. III, pp. 456–460. Further, the equitable remedy where it exists was only available to an unpaid creditor or legatee if the estate had been administered by the court.

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(28) [1919] 1 Ch. 351.
(29) [1920] 1 Ch. 320.
(30) [1928] Ch. 385; [1929] 1 Ch. 1.
(31) [1932] 1 Ch. 54.
(32) (1786) 1 Term Rep. 285.
(33) (1802) 2 East 469.
(34) (1813) 5 Taunt. 143, 152.
(35) (1830) 4 W. & S. 398.
(36) (1831) 5 W. & S. 445.
(37) [1913] 1 Ch. 127.
(38) [1914] A. C. 398, 451.
(39) (1876) 3 Ch. D. 351, 355, 356.
(40) [1911] 1 Ch. 502.
(41) 1 Vern. 90, 93.
(42) 1 Ch. Cas. 256, 257.
(43) 1 Vern. 90, 93.

As to limitation, the claim of the next of kin, if any, is barred under s. 2, sub-s. 1 (*a*), of the Limitation Act, 1939, and s. 20 does not apply, nor does the case fall within the ambit of s. 26. Accordingly the limitation period is six years. The period of limitation prescribed in s. 20 can only apply to the case of an action against an executor. The words " from the date when " the right to receive the share or interest accrued " are inappropriate to any other case. The section is not concerned with innocent third parties. Its opening words throw some light on its true ambit. The scope of s. 19, sub-s. 1 (*b*), is confined to an action against the trustee of trust property and does not cover the case of a claim such as the present against an innocent payee. (See the definition of " trust " in s. 68 of the Trustee Act, 1925.)

The law was clear down to 1939; where an action was against innocent payees the Limitation Act, 1623, applied. If the law laid down in *In re Blake* (44) and *In re Mason* (45) had been altered it would have been done in plain language. The applicability of the Act of 1623 is preserved by s. 2, sub-s. 7, of the Act of 1939. When the legislature introduces into the Act of 1939 a section dealing with mistake, s. 26, it is dealing with mistake in cases where fraud or mistake would be pleaded. But this is a case of money wrongly paid and there is no question of mistake and it does not fall within the ambit of the section at all. The charities were not bound to exercise reasonable diligence to discover the mistake of the executors.

Costs in this case should follow the event. As to the course that has been taken of three of the next of kin, who are very numerous, claiming that their share should be paid to the judicial trustee to be dealt with in due course of administration, the appellant charity offers no objection but without prejudice to the position of other charitable institutions against which actions are pending.

Denys Buckley following. There is nothing in the authorities to support the existence of an equity as wide as that which the Court of Appeal held governed this case, though they declined to define it or to state its nature specifically. The personal representative of a deceased person has to administer the assets in due order of priority. He must find out by inquiry and pay the

(44) [1932] 1 Ch. 54.

(45) [1928] Ch. 385; [1929] 1 Ch. 1.

debts, but he can never be positively certain that he has found all the debts. In an intestacy the administrator must discover the nearest of kin but in cases where there is difficulty in ascertaining it he can never be positive that there is no nearer of kin. In the same way, when pressed by the legatees for distribution before the final estate is known, the personal representative cannot be certain that there will not be a deficiency of assets, or that all the claims of creditors are known. It would prejudice the estate if, before acting, the personal representative or the administrator had to wait until he had attained virtual certainty. Therefore whoever takes must be taken to have done so with notice of the risks enumerated. The element of uncertainty informs the recipient's mind and is analogous to notice of an existing trust so as to make him a qualified constructive trustee whose conscience is contingently affected. It would be inequitable if the personal representative or administrator continued to carry those risks without any right of indemnity.

But in other cases where the person accepting a benefit has no reason to believe that his title is assailable he is entitled to assume that the executor has properly performed his duties, and he cannot be taken to assume that the executor may have made a mistake in law. He is not put on inquiry as to the contents of the will and the question of knowledge or ignorance of the law does not come into play. If there were an equity compelling a person who had innocently received money in the circumstances of this case to refund it, that would go beyond the administration of assets and such a principle would apply equally to the execution of trusts. But no such principle has been applied, and this points to the limitation of the equity to cases of mistake of fact in the administration of assets. The conscience of the payee is unaffected by his subsequently learning of the rights of other persons if he has then parted with the assets, since he did not take with notice of potential adverse claims: (see *Rogers* v. *Ingham* (46).)

Pascoe Hayward, K.C., and *J. L. Arnold* for the respondents. At all material times the sum of 4,000*l.* belonged in equity to the testator's next of kin and should have been paid to them in due course of administration and not to the Westminster Hospital. The equity to be applied is this: Where, in the course of administering the estate of a deceased person, a personal representative either underpays or leaves altogether unpaid a creditor or beneficiary, that creditor or beneficiary has a right to recover, by an action in equity from one who has received as a beneficiary or supposed beneficiary from the personal representative out of the estate payment of something in excess of that to which he is entitled, the amount left unpaid or (as the case may be), the amount underpaid or so much of the said amount as is represented by the said excess. Provided that no such right of recovery can be exercised unless (a) the payment to the recipient of the excess was a devastavit and; (b) the unpaid or underpaid creditor or beneficiary has fully exhausted his remedy (if any) against the personal representative in respect of such devastavit, and provided further that the underpaid creditor or beneficiary shall in exercising his right of recovery give credit to the recipient for anything obtained in the course of exhausting his remedy against the personal representative.

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(46) 3 Ch. D. 351, 355–6.

The remedy is strictly confined to cases of administration. It is purely equitable in the sense that it could never have been enforced in the courts of common law before the Judicature Act. The remedy is available at the suit of an unpaid or underpaid creditor and is available against all persons who have received any part of the estate as beneficiaries or supposed beneficiaries. There is no fundamental distinction between the case of a creditor and a beneficiary, and where a creditor and a beneficiary are plaintiffs no fundamental distinction has ever been drawn between their rights. If one cannot recover, the other cannot either. The right is entirely independent of any right which the personal representative may enjoy at common law against those overpaid or wrongly paid. Generally speaking, the executor has no right at common law: see *Hodges* v. *Waddington* (47).

The existence of the remedy is quite independent of the circumstances in which the payment to the defendant was made. It may have been made by a mistake of fact or of law, or deliberately, as where the personal representative is actuated by malice towards the rightful beneficiary. The remedy rests on a positive and coherent rule of equity. It is not a case in which equity has admitted a few exceptions to an overriding negative proposition that there is in general no relief. In *David* v. *Frowd* (48), where the rule was first applied to the case of next of kin, it was suggested that this was a new type of case but the judge said that it rested on well established principles and he applied the rule as a general principle. It does not appear whether a mistake of fact or of law was involved in that case, but had the distinction been vital the report would have shown whether it was the one or the other. Like *Sawyer* v. *Birchmore* (49), it was a case where no form of bond, as set out by the appellant, would have been any protection.

There is no historical justification for the attempted distinction between mistake of fact and mistake of law. The equitable relief for which the respondents contend was developed in its final form before the middle of the eighteenth century: see *Nelthrop* v. *Hill* (52); *Grove* v. *Banson* (53); *Newman* v. *Barton* (54); *Orr* v. *Kaines* (55). The distinction between mistake of fact and mistake of law had not then grown up and so the early Chancery judges cannot have had any conception of it: see *Farmer* v. *Arundel* (56); *Bize* v. *Dickason* (57); *Bilbie* v. *Lumley* (58); *Brisbane* v. *Dacres* (59); *Wilson and M'Lellan* v. *Sinclair* (61); *Dixon* v. *Monkland Canal Co.* (62). Moreover, even at common law mistake of law is not fatal to an action for money had and received where (as here) the mistake was made by a third party and not by the plaintiff. This was decided in *Blackburn & District Benefit Building Society* v. *Cunliffe Brookes & Co.* (65), which was disapproved by Viscount Haldane, L.C., in *Sinclair* v. *Brougham* (66), but he rested on other grounds.

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(47) 2 Vent. 360.

(48) 1 My & K. 200.

(49) 1 Keen 391; 2 My & C. 611.

The suggested qualification on the equitable relief has no logical foundation and would lead to the most capricious and surprising results. The only logical ground for limiting the equitable relief would be to bring it into harmony with the common law, but this is not wholly possible. For the equitable relief must apply above all in the case of a deliberate payment, Yet this is just the case where no relief will be granted at common law.

As an example of the capricious results of the appellant's contention, take the example of one of two brothers who marries, begets children, makes a will bequeathing his estate to his "children", is divorced, goes abroad, marries again, begets another child and dies; and a brother in England proves his will. Three alternative situations may be taken: (a) The executor never having heard of the child abroad, distributes the estate among the children in England. (b) The executor, although he has heard of the child abroad, construes the will as only referring to the children in England and distributes the estate accordingly. (c) The executor, although he has heard of the child abroad, deliberately excludes him from the distribution, perhaps for personal reasons, perhaps from a religious objection to divorce. (In all three cases the children in England are innocent parties.) The result of the appellant's contention would be that the excluded child could recover the money in the first case but not in the second, and the third case would be uncertain. The

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(52) 1 Ch. Cas. 135.
(53) 1 Ch. Cas. 148.
(54) 2 Vern. 205.
(55) 2 Ves. Sen. 194.
(56) (1772) 2 W. Bl. 824.
(57) (1786) 1 Term Rep. 285.
(58) (1802) 2 East 469.
(59) (1813) 5 Taunt. 143, 155.
(61) 1830 4 W. & S. 398, 409.
(62) 1831 5 W. & S. 445, 450–1.
(65) (1885) 29 Ch. D. 902.
(66) [1914] A. C. 398, 426.

House should reject the distinction resting on the difference between a mistake of fact and one of law. This would bring the law of England into harmony with that of the United States: see the American Restatement of the Law (Restitution), c. 2, sec. 45, comment (c), at pp. 186–7, and Topic 3, at p. 179.

The appellants' further distinction between a payee who has a title and one who has no title is ill founded. It is suggested that the equitable relief is confined to cases where the plaintiff and defendant are linked by a common relationship of title, and is not available where the defendant never had any title at all. But first there is nothing in any of the authorities to suggest that the equitable remedy is so limited. Secondly, the proposition can be accepted only by overruling *David* v. *Frowd* (67). Thirdly, the distinction would be highly artificial. For example, take the case of a will bequeathing the testator's residuary estate to the children of his brother; at the time of his will there are two and at his death three. If on the true construction of the will the estate ought to be divided among all three, whereas in fact it is divided between the two elder children, the third could recover from the overpaid legatees. But, on the appellants' argument, in the case of a division to a stranger there could be no recovery from him, because all three are linked by a common relationship of title. But suppose on the true construction of the will the estate ought to be divided between the two elder children and it is in fact divided between all three. The two elder children could recover nothing from the youngest because ex hypothesi he never had a title to any part of the estate.

As to the suggestion that the equity is narrowed to the form of the bond used in the Consistory Court, the limitation is without foundation. *David* v. *Frowd* (68) and *Sawyer* v. *Birchmore* (69) are cases in which, so far as the bond was concerned, no protection would have been afforded to the claimants.

Further, it is impossible to base this equity on the state of the recipient's conscience at the date of the receipt of the money. That could not be reconciled with the admitted qualification on the claimant's right that he must first exhaust his remedy against the executor. The appellants, in seeking to base the equity on conscience, relied on the element of uncertainty in a normal administration, but in *In re Rivers* (70), Eve, J., assumed the absence of uncertainty. See also *Walcott* v. *Hill* (71). The court will order repayment in cases where there can be no element of uncertainty in the recipient's mind. In the majority of cases the next of kin must be well known in an intestate's family and in such cases it is fanciful to suggest an element of uncertainty.

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(67) 1 My. & K. 200.

(68) 1 My. & K. 200.

(69) 1 Keen 391.

(70) [1920] 1 Ch. 320, 325.

(71) 2 Bro. C. C. 304.

The appellants relied on *Rogers* v. *Ingham* (72), but properly understood that case is slightly in the respondents' favour: see *per* James, L.J. (73). The proper reading of the judgment is that if the lady had not herself been implicated in the payment (as the next of kin here were not) the decision might have been the other way. In *In re Robinson* (74), the judge was not seeking to lay down whether or not any particular action would or would not succeed; he was only saying that the action was of a kind to which the Statute of Limitations would apply by analogy. He was not deciding whether or not the plaintiff had a good claim legal or equitable. So too in *In re Mason* (75), the question was not whether the claim was good but whether the Statute of Limitations applied. So too in *In re Blake* (76), the judge was dealing only with the Statute of Limitations, 1623, and was not examining the nature of the equitable action. *Hilliard* v. *Fulford* (77) was concerned really with the question how the costs of the administration suit were to be borne and does not assist the appellant. *In re Hatch* (78) has nothing to do with this case and contains nothing to negative the existence of the equity asserted by the next of kin. *Fitzpatrick* v. *M'Glone* (79) is not directly on this point. See also *Sinclair* v. *Brougham* (80), and *Harris* v. *Harris* (*No.* 2) (81).

The effect of the cases is that the equitable remedy on which the next of kin rely exists. The limitations on it sought to be imposed by the appellant should be rejected. There is no evidence of them in the decided cases and they would lead to illogical results. The equity does not depend on the conscience of the recipient at the time of the receipt of the money. The purpose of the equitable remedy is to protect the equitable interest of the plaintiff—an existing equitable interest which the plaintiff enjoys. The court has always insisted on the plaintiff first exhausting his right against the executor. If it were a question of conscience the court would allow the plaintiff to go straight to the recipient. That being the nature of the equity, it should be applied in all cases where the plaintiff's equitable interest needs protection.

As to the period of limitation, this is an action "in respect "of any claim to the personal estate of a deceased person" within s. 20 of the Limitation Act, 1939, and it was brought within the twelve years mentioned in the section. The words

(72) 3 Ch. D. 351.
(73) Ibid. 354.
(74) [1911] 1 Ch. 502, 508, 511.
(75) [1928] Ch. 385, 390–1, 394–5.
(76) [1932] 1 Ch. 54.
(77) 4 Ch. D. 389.
(78) [1919] 1 Ch. 351.
(79) [1897] 2 I. R. 542.
(80) [1914] A. C. 398, 454.
(81) (1861) 29 Beav. 110.

of the section reflect s. 30, sub-s. 2, of the Administration of Estates Act, 1925, and s. 3 of the Intestates Estates Act, 1884 (cf. s. 2 of that Act, where the word "recovery" is used in the case of a direct action against the person to whom administration has been granted as a nominee of the Crown). If this is an action "for relief from the consequences of a mistake" within s. 26 (*c*) of the Act of 1939, time does not begin to run till the plaintiffs discovered or could, with reasonable diligence, have discovered, the mistake. See also the Limitation Act, 1623, s. 3.

J. L. Arnold following. For the appellants it is contended that the test which should be applied to determine whether the recipients are susceptible to the operation of this equitable remedy is to see whether they realized, or should have realized, that they were receiving something which the next of kin should have had. In general it cannot be said that all equitable jurisdictions are founded on the tender conscience of the defendant. This is particularly evident when the court is supervising the administration of property. In bankruptcy it is concerned to see that every creditor has his proper share of the assets. In the winding-up of partnerships it is basically concerned not with conscience but to see that everyone receives his true due. So, too, in the execution of trusts and in the administration of assets. From the earliest times in which this equity has been considered and applied the executor has not been allowed to undo his assent and recover against the improperly paid recipient: see *Noel* v. *Robinson* (82), *Hodges* v. *Waddington* (83), and *Orr* v. *Kaines* (84).

As to the period of limitation, time does not begin to run until the remedy against the executors is exhausted. If, however, the claimant was guilty of delay in taking action against the executors he would be barred from his equitable remedy against the recipient by reason of laches. Therefore he could not unreasonably prolong the exercise of his remedy, lulling the recipient into a false security.

Upjohn, K.C., in reply. The recipients are strangers to the estate and the onus is on the next of kin to show that they have a right to recover the money from them. The onus is not on the recipients to prove the existence of some lesser equity excluding them. The equity must be narrower than that proposed by the next of kin. They suggested that the equity they sought to establish was confined to the case of the administration of assets of deceased persons but such an equity could not, for historical reasons, embrace third parties in an administration and exclude third parties in the case of trusts. If the law be that in the case of a personal representative making a wrong payment there is a right in an unpaid beneficiary to recover from the recipient of the wrong payment, there must be a similar remedy for the cestui que trust. The next of kin submit that under the equity there is a remedy against a supposed beneficiary, but no authority states such a proposition. They also suggest that if a beneficiary could not recover in the present circumstances nor could a creditor, but that is a proposition unsupported by any authority. The position of a creditor may well be different from that of a beneficiary. The two are not in pari materia.

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(82) 1 Vern. 90.
(83) 2 Ventris 360.
(84) 2 Ves. Sen. 194.

The equity in its true nature is applicable only to mistakes of fact. Then an unpaid or underpaid creditor or beneficiary in a direct action can enforce in equity a claim in personam against an overpaid beneficiary, even in a case where the personal representatives themselves are precluded from obtaining recovery. The existence of this equity is founded on the fact that in such a case the parties are all linked by the common relationship of being entitled to a share in the assets of the deceased. In such a case the beneficiary who receives a distribution does so on the footing that he will refund if in the event he is proved to have received more than his share. He takes under a title which is essentially defeasible in favour of other parties having a prior or co-ordinate title. The liability to refund does not involve the denial of his title since he may receive a further distribution if further funds fall into the estate.

The circumstances are different when the recipient is sued on the ground that he never had a title at all. Two cases may be distinguished: (a) the case where the recipient has asserted a title (e.g., by claiming to be a next of kin), and (b) such a case as the present where the recipient never did or could have asserted a title at all. The equity available against a beneficiary is not available in either of these cases. Even if available in the former it is certainly not available in the latter. There is no general right to recover ex aequo et bono. The equity is set out in Roper on Legacies (4th ed.), Vol. I, pp. 456–60. The line must be drawn as a result of legal reasoning and not in the light of cases of individual hardship. Further the right of adjustment between legatees is confined to the case of persons who have valid legacies, for true legacies, though paid, remain legacies in the hands of the legatee: see *Chamberlain* v. *Chamberlain* (85). Again, when next of kin are paid, nearer of kin may come in: *David* v. *Frowd* (86). Defeasibility is the point. The principles of *David* v. *Frowd* (86) cannot be applied to this case at all. Where a person takes as an object of the testator's bounty he takes subject to a liability to recoup in order to achieve equality

(85) 1 Ch. Cas. 256.

(86) 1 My. & K. 200.

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or to pay legatees of a higher rank, if at the time he was overpaid. Persons who take as next of kin know that they take subject to the possible claims of nearer of kin. But nobody takes on the footing that his gift is invalid. This is the general principle to be extracted from the decided cases. In the case of a pure money claim between people who are strangers it is of the essence that one should be able to fasten on the conscience of the person against whom the claim is made. [He referred to *Thomas* v. *Griffith* (87); *In re Rivers* (88); *David* v. *Frowd* (89) and *Cooper* v. *Phibbs* (90).]

As to the limitation point, from 1623 to 1939 if A paid money to B under a mistake of fact he could only claim to recover it within six years of the mistake: see *Baker* v. *Courage & Co.* (91). That limitation has not been changed by the Act of 1939. It is inconceivable that s. 2 does not include the action for money had and received or that the limitation should have been so extended by the omnibus cover in s. 20. The time runs from the wrongful payment and not from the date when the next of kin have exhausted their remedy against the executors. [He referred to *Clark* v. *Hougham* (92).]

Their Lordships took time for consideration.

Nov. 23. LORD SIMONDS. My Lords, I think that the reasoning and conclusion of the Court of Appeal are unimpeachable, and it is right to add that, if Wynn-Parry, J., had had the advantage of the citation of authorities and of the argument based upon them which the Court of Appeal and your Lordships have had, he might have come to a different conclusion.

The problem for determination can be simply stated and it is perhaps surprising that the sure answer to it is only to be found by examination of authorities which go back nearly 300 years. Acting under a mistake the personal representatives of a testator whose residuary disposition is invalid distribute his residuary estate upon the footing that it is valid. Have the next of kin a direct claim in equity against the persons to whom it has been wrongfully distributed? I think that the authorities clearly establish that, subject to certain qualifications which I shall state, they have such a claim.

I think that it is important in the discussion of this question to remember that the particular branch of the jurisdiction of the Court of Chancery with which we are concerned relates to the administration of assets of a deceased person. While in the development of this jurisdiction certain principles were established which were common to it and to the comparable jurisdiction in the execution of trusts, I do not find in history or in logic any justification for an argument which denies the possibility of an equitable right in the administration of assets because, as it is alleged, no comparable right existed in the execution of trusts. I prefer to look solely at the authorities which are strictly germane to the present question: it is from them alone that the nature and extent of the equity are to be ascertained.

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(87) 2 Giff. 504, 507–8.

(88) [1920] 1 Ch. 320, 324–5.

(89) 1 My. & K. 200, 202.

(90) (1867) L. R. 2 H. L. 149.

(91) [1910] 1 K. B. 56.

(92) (1823) 2 B. & C. 149.

Before I turn back to the 17th century when the Court of Chancery was gradually wresting from the Spiritual Courts the jurisdiction in administering the assets of deceased persons and framing apt rules to that end, I will first refer to a statement made by Lord Davey early in this century, which, as I think, illuminates the position. In *Harrison* v. *Kirk* (93) Lord Davey says this: " But the Court of Chancery, in order to do justice " and to avoid the evil of allowing one man to retain what is " really and legally applicable to the payment of another man, " devised a remedy by which, where the estate had been " distributed either out of court or in court without regard to " the rights of a creditor, it has allowed the creditor to recover " back what has been paid to the beneficiaries or the next of kin " who derive title from the deceased testator or intestate ".

The importance of this statement is manifold. It explains the basis of the jurisdiction, the evil to be avoided and its remedy: its clear implication is that no such remedy existed at common law: it does not suggest that it is relevant whether the wrong payment was made under error of law or of fact: it is immaterial whether those who have been wrongly paid are beneficiaries under the will or next of kin, it is sufficient that they derive title from the deceased. It is true that Lord Davey expressly dealt with the case of a claimant creditor not a beneficiary or next of kin. I shall show your Lordships that what he said of the one might equally well be said of the other. It would be strange if a court of equity, whose self-sought duty it was to see that the assets of a deceased person were duly administered and came into the right hands and not into the wrong hands, devised a remedy for the protection of the unpaid creditor but left the unpaid legatee or next of kin unprotected.

I think, my Lords, that it is not necessary for me to review all the authorities. This has been done with exhaustive accuracy by the Court of Appeal. I will refer only to certain cases which appear to me to be landmarks in the history of the equitable doctrine. In any such history the name of Lord Nottingham must have first place. In *Noel* v. *Robinson* (94) the Lord

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(93) [1904] A. C. 1, 7.

(94) 1 Vern. 90, 93.

Chancellor, after referring to the practice of the Spiritual Courts under which the executor was entitled to demand security of the legatee before paying his legacy in case the amount was required in discharge of debts, said: " . . . but in this court, though " there be no provision made for refunding, yet the common " justice of this court will compel a legatee to refund. It is " certain that a creditor shall compel the legatee to refund, and " so shall one legatee compel the other, where the assets become " deficient . . ."

I pause here for two purposes. First, I point out that already in 1682 a creditor and a legatee shared the remedy established by the common justice of the Court of Chancery. Secondly, it is a proper moment at which to deal with an argument which was put forward by learned counsel for the appellant. They urged that it was only in a limited class of cases that the Spiritual Court required a legatee, who was paid his legacy, to give security; first, to meet the contingency of further creditors appearing, and, secondly, to meet the case of a deficiency of assets to pay all legacies of equal rank pari passu; and that the remedy which the Court of Chancery gave should be similarly circumscribed. The purpose and effect of the argument, if accepted, would be to deny any remedy against persons wrongly paid to next of kin rightfully entitled. I cannot accept this argument. In the first place I am by no means satisfied that the practice of the Spiritual Court was so limited. The contention was largely based on the fact that the only two precedents of bonds which had been discovered did not cover any other than the contingencies already mentioned. At this distance of time I do not think that this can be regarded as conclusive evidence of the practice. But in the second place I see no justification for regarding the equitable doctrine of the Court of Chancery as limited to the previous practice, if it was the practice, of the Spiritual Court. That it was not so regarded will appear from a later case to which I will shortly refer.

I pass over numerous cases in which the equitable remedy was refined and elaborated: their effect is stated in the judgment of the Court of Appeal and summarized in the passage from Roper on Legacies (4th ed., 1847), Vol. I, c. VII, s. III, pp. 456–60, which is cited in that judgment (95). But I should in passing mention *Orr* v. *Kaines* (96) in which it was clearly established that the right of an underpaid legatee to claim directly against the overpaid legatee is subject to this qualification, that he must first exhaust his remedy against the executor who has made the wrongful payment. It was for this reason that I mentioned at an earlier stage of this opinion that the next of kin must be deemed to have recovered from the executors all that they could

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(95) [1948] Ch. 465, 483.

(96) 2 Ves. Sen. 194.

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recover. They had then no other way to recover the balance that was due to them than by proceeding directly against the appellant and other institutions amongst which the executors had distributed the estate.

It must at this point be said that a distinction on which Wynn-Parry, J., relied has no validity. Not having had his attention called to the earlier authorities, the learned judge was disposed to think that the equitable remedy, even where it existed, was only available to an unpaid creditor or legatee if the estate had been administered by the court. There is no ground for this broad distinction, though it may well be that *a* distinction exists, viz.: that, where the executor has distributed the estate under an order of the court, the unpaid creditor would not be required to bring a further action against him before proceeding against persons wrongfully paid.

I go forward nearly a century, during which the equitable doctrine had been recognized by successive Lord Chancellors and Masters of the Rolls, and come to *David* v. *Frowd* (97) a case upon which the respondents rely as most nearly resembling the present case. The resemblance lies in the fact that there too the plaintiff was next of kin of an intestate who claimed against the defendants that the estate of the intestate should have been paid to her but had been wrongfully paid to them. The distinction, if it is a material one, is that there the payment had been due to a mistaken view (whether of fact or law) that the defendants were the true next of kin, here it was due to a mistaken view as to the validity of the residuary bequest.

My Lords, I think that, subject always to one point to which I shall presently refer, *David* v. *Frowd* (98) is an authority strongly in favour of the respondents. It is fatal to the appellants' argument, which I have already mentioned, that the equitable remedy was confined to the cases of unpaid creditor or legatee, and is consistent only with the view that the remedy was one (to adapt Lord Davey's words) devised by the Court of Chancery in the administration of assets of a deceased person to avoid the evil of allowing one man to retain money legally payable to another and was applicable wherever it could appropriately be applied.

Two other cases upon which the respondents relied I will mention before I examine those which the appellant cited as supporting his contention, the first *Peterson* v. *Peterson* (99), in which Lord Romilly, M.R., once more asserted the equity, making no distinction between claimant residuary legatees and next of kin, and, the second, *In re Rivers* (100), where Eve, J., recognized and applied it.

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(97) 1 My. & K. 200.
(98) Ibid.
(99) L. R. 3 Eq. 111.

Here then, my Lords, is a long line of authority extending over more than 250 years, resting on decisions of judges of the highest authority and broken by no dissentient voice. Why should it not cover the present case? Three arguments put forward by the appellant I have already mentioned and disposed of, the first founded upon a supposed relation between the assumed practice of the Spiritual Court and the scope of the remedy provided by the Court of Chancery, the second based upon a distinction between wrongful payments made when there has and when there has not been administration by the court, and the third (which is bound up with the first) that there is a distinction between claimant residuary legatees and next of kin.

It remains to deal with two other arguments. It was said that the equity was not applicable against a "stranger" and that the appellant (or the hospital through whom it claimed) having been paid money to which it was not lawfully entitled, since the disposition under which it took was invalid, was to be regarded as a stranger. This argument is wholly without substance. The hospital received 4,000*l.* for no other reason than that the executors thought that it was a proper object for the testator's bounty. It was treated as a beneficiary under the testator's will and, to use Lord Davey's words, derived title under it. It does not appear to me that a person so receiving money from the estate of a testator is in a different position from any other person to whom money is paid upon the footing that under the testator's will money can be lawfully paid to him though in fact the payment is wrongful.

I come finally to the argument upon which counsel for the appellant laid the greatest stress, relying not only on the judgment of Wynn-Parry, J., but upon the other cases which have yet to be examined. It was that the equitable remedy was subject at least to this qualification, that it was not applicable where the wrongful payment was made in error of law. It was said that in every case where it had been applied the wrongful payment had been made under a mistake of fact and that wherever the principle had been stated without any such qualification, it must be read, nevertheless, as subject to it. I think, my Lords, that this argument which found favour with the judge is misconceived.

In the first place, though in almost all the reported cases the probability is that the wrongful payment was made under a mistake of fact, that is not true of all of them and in many of them, while the probability is in one direction, there can be no

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(100) [1920] 1 Ch. 320.

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certainty without further information which is not now available. This leads directly to the second reason. In not one of the many cases where the equity was applied was any suggestion made in argument or judgment that the issue depended on the nature of the mistake under which the wrongful payment had been made. It is not credible that, if the distinction between mistake of fact and law was relevant, it would never have been mentioned, particularly at a time when in the courts of common law it was being established. And here it may be observed that the equitable doctrine was well settled before that event took place: for such cases as *Farmer* v. *Arundel* (101); *Bize* v. *Dickason* (102); *Brisbane* v. *Dacres* (103); *Bilbie* v. *Lumley* (104), show that up to the end of the eighteenth century there were in high places doubts as to the validity of the distinction in the common law.

In the third place the most satisfactory reason for the distinction rests in the maxim, itself probably taken from the criminal law, ignorantia juris neminem excusat: see *Baylis* v. *Bishop of London* (105). The man who makes a wrong payment because he has mistaken the law may not plead his own ignorance of the law and so cannot recover what he has wrongfully paid. It is difficult to see what relevance this distinction can have, where a legatee does not plead his own mistake or his own ignorance but, having exhausted his remedy against the executor who has made the wrongful payment, seeks to recover money from him who has been wrongfully paid. To such a suit the executor was not a necessary party and there was no means by which the plaintiff could find out whether his mistake was of law or of fact or even whether his wrongful act was mistaken or deliberate. He could guess and ask the court to guess but he could prove nothing. I reject therefore the suggestion that the equitable remedy in such circumstances was thus restricted and repeat that it would be a strange thing if the Court of Chancery, having taken upon itself to see that the assets of a deceased person were duly administered, was deterred from doing justice to creditor, legatee or next of kin because the executor had done him wrong under a mistake of law. If in truth this were so, I think that the Father of Equity would not recognize his child.

I turn now to the cases on which the appellant relies. The first of these is *Rogers* v. *Ingham* (106) and, as it is placed in the forefront of the appellant's argument (as it was in the judgment of the judge), it is worth examining in some detail. The headnote reads as follows: " The court will not in all cases relieve

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(101) 2 W. Bl. 824.
(102) 1 Term Rep. 285.
(103) 5 Taunt. 143.
(104) 2 East 469.
(105) [1913] 1 Ch. 127
(106) 3 Ch. D. 351.

" against a payment of money under mistake of law. An " executor, acting on the advice of counsel on the construction of " a will, proposed to divide in certain proportions a fund between " two legatees. One of the legatees being dissatisfied took the " opinion of counsel, which agreed with the former opinion. The " executor then divided and paid over the fund in accordance with " the opinions. Two years afterwards the dissatisfied legatee " filed a bill against the executor and the other legatee, alleging " that the will had been wrongly construed, and claiming repayment from the other legatee: *Held* (affirming the decision of " Hall, V.-C.), that the suit could not be maintained ".

As appears from the headnote, the case came first before Hall, V.-C., and, though there is no note of the argument before him, it is clear from his judgment how he regarded the issue. " It seems to me," he said (107), " that the fund was divided " as a matter of arrangement between the parties, and that " having taken place more than two years before the bill was " filed, I ought not to give the assistance of this court for the " purpose of recalling that fund from the defendant, who received " it upon the faith and footing of what took place on that " occasion." From his judgment the plaintiff appealed, and again it is clear how the issue was regarded both by counsel and by the court. " Payment by my trustee is payment by me, and " I ought to recover the money. . . . A court of equity can " relieve against the consequences of a mistake of law; moreover " this is hardly a pure question of law." Thus argued the counsel for the appellant (108). He made no reference to the long line of authority which confirmed the equitable right that arises in an administration of assets, perhaps because the act of wrongful distribution was done by Ingham, the surviving executor and trustee, not in his capacity of executor (in this respect the headnote is misleading) but in his capacity of trustee distributing a trust fund. He may have thought and he may have rightly thought (I do not think it necessary to decide it) that the cases had no relevance to an alleged breach of trust. Nor on the other hand did counsel for the respondent legatee point out that according to the established rule the plaintiff could not recover from him until she had exhausted her remedy against Ingham or his estate. Ingham had in fact died and his executor was a party to the suit, but he seems to have taken no part in the proceedings and there was no evidence that Ingham's estate was insolvent.

It was in these circumstances that James, L.J., almost in the opening words of his judgment said (109): " When a trustee, by " the direction or with the authority of his cestui que trust, pays

(107) 3 Ch. D. 353.
(108) Ibid. 354.
(109) Ibid. 355.

"money to a third person, no matter under what claim of right "or under what circumstances, it is exactly the same as if the "cestui que trust had received the money from the trustee, and "had herself paid it to that person. It is simply a question of "money paid by the lady, or by the lady's direction, out of money "of hers which the trustee had in hand to a person who said that "he had a claim to the money".

Already it is sufficiently clear what are the facts to which the relevant law must be applied, but I will cite a few lines more which are a clue to the whole judgment. "That being so," the Lord Justice goes on, "it is reduced, as it appears to me, "to a mere action for money had and received, and it is the "same as if A through a third person had paid money to B, "thinking that B was entitled to it, B thinking also that he was "entitled to it; there having been, as it is now said, a mistake of "law which was common to both parties." It is in this context that he later uses the words so much relied on by the appellant: "I have no doubt that there are some cases which have "been relied on, in which this court has not adhered strictly "to the rule that a mistake in law is not always incapable of "being remedied in this court; but relief has never been given "in the case of a simple money demand by one person against "another, there being between those two persons no fiduciary "relation whatever, and no equity to supervene by reason of the "conduct of either of the parties". It is, I think, clear that the Lord Justice, whose every word on a question of equitable principle is weighty, was dealing solely with a case where (in his own language) a trustee by the direction or with the authority of his cestui que trust pays money to a third person, and was not dealing with a case where without his acquiescence or even his knowledge an executor wrongs a creditor or beneficiary by paying to another money which should be paid to him.

The next case to be considered is *In re Robinson* (110). Two preliminary observations may be made, first, that the case was not concerned with a wrongful distribution of assets in the administration of an estate, secondly, that the sole question was what, if any, Statute of Limitations was applicable to the claim. The claim was by a beneficiary under a trust, who alleged that he had been underpaid, directly against a beneficiary under the same trust who had been overpaid. The judge had first to determine its nature. It was, he said (111), a "mere money demand "by the plaintiff against the defendant". He then states the rival contentions, the defendant saying that it was in reality a common law action for money had and received and therefore barred by the lapse of six years under the statute of James I, the plaintiff on the other hand saying that, where a trust fund had by mistake been paid by the trustee to the wrong beneficiary, there was not in the old Court of Chancery any bar by lapse of time to the recovery of lost money. He says that the defendant's contention would prima facie appear to be right, analysing the position and saying that the party whose money has been wrongly paid away could at all events have maintained a suit in equity for it—a statement which points the contrast between such a suit and one by a legatee against a legatee in which the joinder of the executor as plaintiff was fatal (see *Hodges* v. *Waddington* (112)) —and concludes (113): "But whether the action is treated as a "strict claim in law for money had and received, or whether it is "brought as a claim in equity through the medium of the "trustee—in whichever way it is regarded—at first sight, inasmuch as the court has always acted by analogy to the statute, "one can see no reason why the period fixed by the statute should "not bar the right of the plaintiff to recover".

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(110) [1911] 1 Ch. 502. (111) Ibid. 507

The judge then deals with certain cases on which the plaintiff had relied and sums up by a classification of the cases in which mistakes have been made by trustees in payment of trust funds. I doubt, with respect, whether the classification is exhaustive, but in any case it is made for no other purpose than to show in what cases a court of equity regarded a claim by a cestui que trust as not barred by any lapse of time. The judge concludes thus (114): "The present case resolves itself into this—that "although, owing to the fact that the plaintiff is not the person "who paid the money, the action is one which could not have "been maintained at common law, it is in substance a mere "money demand to which a court of equity, acting by analogy "to the statute, would apply the same period of limitation".

I have been led to examine this case at some length because of the emphasis laid upon it by the appellant. Having done so, I find in it no support for the contention that the equity which is the foundation of the present claim is qualified by the condition that the wrongful payment must not have been made under a mistake of law. The judge was not considering that question. With great respect, I cannot (notwithstanding the subsequent approval of Romer, J., in the case to which I next refer) accept his reading of the decree made by Lord Romilly, M.R., in *Harris* v. *Harris (No. 2)* (115), for it is, I think, clear that the defendant in that suit was in effect held liable to repay moneys which he had been wrongly paid, though in form the liability was declared to be to replace certain annuities of which he had received the proceeds of sale. Nor, with respect, can I assent to the view first expressed by the judge (116) that the action is prima facie "in reality a common law action for money had and received", though I would be inclined to accept the modified statement already cited with which he concludes his judgment. I see no reason to doubt that to a claim whether made by legatee against legatee or by cestui que trust against cestui que trust, in respect of a payment made under a mistake of fact or of law, a court of equity could properly before the Limitation Act of 1939 came into force apply by analogy the statute of James I. Nor do I understand that counsel for the respondents on this appeal dissents from that proposition.

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(112) 2 Vent. 360.
(113) [1911] 1 Ch. 502, 508.
(114) Ibid. 513.
(115) 29 Beav. 110.

I am brought now to the case of *In re Mason* (117). The judgment of Romer, J., in that case, so far as it was in any way relevant to the matter under appeal, was that a petition of right presented by the next of kin of a lunatic who had died in 1798 was barred by the statute of James I. I do not doubt that the decision was correct for the same reasons that I have given in regard to the decision in *In re Robinson* (118). But the appellant relies upon certain statements by the judge which in his contention militate against the view that the equitable doctrine relied on by the respondents was applicable where the wrongful payment was made under a mistake of law.

The judge makes the assumption that the whole of the estate of the lunatic had come into the hands of King George III and says (119): "On that assumption the claim of the suppliants is "one to recover from the Crown moneys that in fact belonged to "Maria L'Epine's next of kin, but was wrongfully paid over by "her administrators to King George III. It is, in other words, "a claim by a cestui que trust to recover from a third party "money which his trustee has by mistake paid to that third "party. Such a claim is one for money had and received". I pause to observe that the judge, who had had cited to him none of the long line of cases involving claims for refund in the administration of assets, treated the claim as if it were a claim by one cestui que trust against another and then referred to such a claim as one for money had and received. And it was upon that footing that after referring to the case of *In re Robinson* (120) he said (121) that "if the claim of the trustee would be barred "in an action at law by any Statute of Limitations, the claim "of the cestui que trust, so far as it was one for money had and "received, would be equally barred". My Lords, I must with the greatest deference to the judge observe that an action by legatee or next of kin to recover money paid to the wrong person in the administration of assets is not a claim by one cestui que trust against another, and that, whatever may be said of the latter, it cannot with any formal accuracy be said that the former is an action for money had and received. Such an action is an action at common law deriving from indebitatus assumpsit: I will not embark upon the rather arid dispute whether its gist was an implied promise, but it has, I think, no relation to the equity by which for 300 years such a claim as the respondents now make has been supported. It is true that in *Moses* v. *Macferlan* (122) Lord Mansfield, C.J., said, "In one word, the gist of this kind "of action is, that the defendant . . . is obliged by the ties of "natural justice and equity to refund the money", but this broad statement contained perhaps less the basis upon which the action at common law was founded than an aspiration as to the area over which it might one day extend. There remained a field over which "this essentially common-law action" (as Lord Sumner called it in *Sinclair* v. *Brougham* (123)) did not extend. The plaintiff in *David* v. *Frowd* (124), for instance, could not, I think, have maintained an action for money had and received in a court of common law. If this is so, the fact that, as the common law action developed, it was established that a mistake of law would not support a claim for repayment, appears to me to afford no justification for saying that this equitable right was similarly limited. Therefore while, as I have said, I do not question the decision, which was indeed affirmed by the Court of Appeal, I do not think that it helps the appellant's case. In the Court of Appeal Lawrence, L.J. (125), agreed that the proceedings were "in effect" proceedings for money had and received. My respectful comment would be that this is not an inaccurate statement since the effect of the action, if it succeeds, would be the same.

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(116) [1911] 1 Ch. 502, 507.
(117) [1928] Ch. 385.
(118) [1911] 1 Ch. 502.
(119) [1928] Ch. 385, 391.
(120) [1911] 1 Ch. 502.
(121) [1928] Ch. 385, 392.

The appellant next relied on some observations made by Maugham, J., in *In re Blake* (126), a case not unlike *In re Mason* (127), in that here too it was pleaded by the Crown that a claim made by petition of right was barred by the statute of James I. In the course of his judgment the judge said (128): "An action in the Chancery Division brought by the next of kin "against a person to whom the administrator had wrongly paid "part of the personal estate of the intestate under a mistake of "fact (not joining the administrator and seeking administration) "would be in the nature of a common law action for money had "and received, and the court acting on the analogy of the statute "of James I (21 Jac. 1, c. 16) would hold the claim to be barred

(122) (1760) 2 Burr. 1005, 1012.
(123) [1914] A. C. 398, 456.
(124) 1 My. & K. 200.
(125) [1929] 1 Ch. 1, 12.
(126) [1932] 1 Ch. 54.
(127) [1928] Ch. 385; [1929] 1 Ch. 1.
(128) [1932] 1 Ch. 54, 60.

"after the lapse of six years from the date of payment". It would, I think, be hypercritical to quarrel with this statement in which the judge so guardedly refers to such an action as being "in the nature of a common law action". In my judgment it gives no support to the appellant's contention. Two other cases I will do no more than mention, *Hilliard* v. *Fulford* (129) and *In re Hatch* (130), for I am fully satisfied with the observations of the Court of Appeal upon them.

Finally, my Lords, I must say some words on an argument of a more general character put forward on behalf of the appellant. The Court of Chancery, it was said, acted upon the conscience, and, unless the defendant had behaved in an unconscientious manner, would make no decree against him. The appellant or those through whom he claimed, having received a legacy in good faith and having spent it without knowledge of any flaw in their title, ought not in conscience to be ordered to refund. My Lords, I find little help in such generalities. Upon the propriety of a legatee refusing to repay to the true owner the money that he has wrongly received I do not think it necessary to express any judgment. It is a matter on which opinions may well differ. The broad fact remains that the Court of Chancery, in order to mitigate the rigour of the common law or to supply its deficiencies, established the rule of equity which I have described and this rule did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid. No doubt the plaintiff might by his conduct and particularly by laches have raised some equity against himself; but if he had not done so, he was entitled to be repaid. In the present case the respondents have done nothing to bar them in equity from asserting their rights. They can only be defeated if they are barred at law by some Statute of Limitations.

It is common ground between the parties that the only statute now applicable is the Limitations Act, 1939, which came into operation on July 1, 1940, and the question is which of the sections of this Act is applicable to the present case. I hope I shall not be thought wanting in respect to the elaborate argument of counsel for the appellant if I deal with this question very shortly. I do so because on the main point, viz., the applicability of s. 20, which the respondents assert and the appellant denies, I am in complete agreement with the reasoning and conclusion of the Court of Appeal and cannot usefully add anything of my own. The present action is precisely within the language of the section: it is in respect of a claim to the personal estate of Caleb Diplock, and there is nothing in the ancestry of the section which justifies, much less requires, a narrower meaning being given to

(129) 4 Ch. D. 389.

(130) [1919] 1 Ch. 351.

its words than they ordinarily bear. It is suggested that there is something awkward or inapposite in the terminus a quo, inasmuch as the relevant period is to run "from the date when "the right to receive the share . . . accrued". I think that this criticism is ill-founded. There is nothing inappropriate in a legatee or next of kin who has brought no action for twelve years after the executor's year has expired being barred from such action whether against the executor himself or against the person to whom the executor has made a wrongful payment. At the least there is nothing so inappropriate in such a result as to deprive the substantive words of the section of their plain meaning. Section 20 applying to this action and, it being conceded that the relevant period had not expired before it was brought, the defence under the statute fails. I think it therefore unnecessary to say anything about s. 26 by way of approval or disapproval of what fell from the Court of Appeal. It is a section which presents many problems.

One thing only remains to be said. The action was brought by three only of the next of kin, who are said to be a numerous body, and their claim was not that their share of the 4,000*l.* wrongfully paid away should be paid to them but that the whole of that sum should be paid to their co-plaintiff the judicial trustee to be dealt with by him in due course of administration of the estate. No objection was taken by the appellant to this course at any stage of the action and his counsel has expressly disclaimed any wish to do so now. Accordingly this appeal must be dismissed. But he has at the same time properly said that his present disclaimer should not prejudice any other of the numerous charitable institutions against whom similar actions are pending. I agree and express no opinion whatever whether any such objection could be sustained.

I move, my Lords, that the appeal be dismissed with costs.

LORD NORMAND. My Lords, I concur.

LORD OAKSEY. My Lords, I agree.

LORD MORTON OF HENRYTON. My Lords, I also agree.

LORD MACDERMOTT. My Lords, I also agree.

Appeal dismissed.

Solicitors: *Trollope & Winckworth; White & Leonard.*

H. L. (E.)*

1950
Oct. 23,
24, 25;
Nov. 8, 9, 30.

[HOUSE OF LORDS]

RALEIGH CYCLE CO. LD. . . . . APPELLANTS;

AND

H. MILLER & CO. LD. . . . . RESPONDENTS.

Patent—Practice and procedure—Action for infringement and counter-claim for revocation—One claim only held valid and infringed—Case remitted to Chancery Division from House of Lords—Direction "to determine what, if any, relief should be granted . . . in accord-"ance with s. 32A of the Patents and Designs Acts, 1907–1946*"—Jurisdiction to entertain application under s.* 22*—Patents and Designs Acts,* 1907–1946, *ss.* 22, 32A.

By s. 22 of the Patents and Designs Acts, 1907–1946: "In any "action for infringement of a patent or proceedings before a court "for the revocation of a patent the court may by order allow the "patentee to amend his specification by way of disclaimer, correc-"tion or explanation in such manner, and subject to such terms . . . "as the court may think fit: Provided that no amendment shall be "so allowed that would make the specification, as amended, claim "an invention substantially larger than, or substantially different "from, the invention claimed by the specification as it stood before "the amendment . . .".

By s. 32A, "Where the court in any action for infringement of "a patent finds that any claim in the specification, in respect of "which infringement is alleged, is valid, but that any other claim "therein is invalid, then, notwithstanding anything in s. 23 of this "Act—(*a*) if the patentee furnishes proof to the satisfaction of the "court that the invalid claim was framed in good faith and with "reasonable skill and knowledge . . . the court shall, subject . . . "to such terms as to amendment of the specification as it may deem "desirable, grant relief in respect of any valid claim which is "infringed without regard to the invalidity of any other claim in "the specification . . . (*b*) if the patentee does not furnish proof as "aforesaid . . . the court shall not grant any relief by way of "damages or costs, but may grant such other relief in respect of "any valid claim which is infringed as to the court seems just, and "may impose such terms as to amendment of the specification as a "condition of granting any such relief as it may deem desirable; "(*c*) if a counter-claim for revocation of the patent has been made "in the action on the ground of the invalidity of any claim in the "specification, the court may postpone the operation of any order "made thereon during such time as may be requisite for enabling "the patentee to effect any amendment of the specification pursuant "to terms imposed upon him and may attach any such other con-"dition to any order to be made on the counter-claim as the court "may deem desirable".

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

H. L. (E.)

1950

RALEIGH CYCLE Co. LD. v. H. MILLER & Co. LD.

The plaintiffs, the proprietors of letters patent, brought an action for infringement against the defendants, who counter-claimed for revocation. The House of Lords on appeal held that, while claims 1 to 4 of the specification were too wide and invalid on the ground that the scope of the monopoly claimed was not sufficiently and clearly ascertained, claim 5 (the only remaining claim) was valid and infringed, and the cause was remitted to the Chancery Division " to " determine what, if any, relief should be granted to the [plaintiffs] " in accordance with s. 32A of the Patents and Designs Acts, 1907– " 1946, and to do therein as shall be just and consistent with this " judgment ". The plaintiffs gave notice of motion in the Chancery Division for a certificate of validity of claim 5. They also applied in the proceedings to amend the specification so as to eliminate the features which had led the House of Lords to hold claims 1 to 4 invalid. They did not furnish proof that these claims were " framed in good faith and with reasonable skill and knowledge ". The defendants by notice of motion asked that the patent should be revoked. The judge gave the plaintiffs leave to amend the specification and granted a certificate of validity in respect of claim 5. The Court of Appeal held that there was no jurisdiction to amend under s. 22 and, as a condition for relief to the plaintiffs, imposed a term under s. 32A that claims 1 to 4 should be struck out. On appeal to the House of Lords:—

Held, (per Lord Simonds, Lord Normand, Lord Oaksey and Lord Morton of Henryton; Lord MacDermott dissenting) that, on the assumption that the judge had jurisdiction to make the order, he did not exercise his discretion properly inasmuch as he did not give sufficient weight to the paramount consideration that, while it was clear from the outset that the attack on the patent would be sustained on the grounds, among others, that the scope of the monopoly claimed was not sufficiently and clearly ascertained, the plaintiffs, without any special circumstances to justify the course, maintained the validity of the invalid claims up to the House of Lords and only thereafter sought to amend them.

Per Lord Morton of Henryton and Lord MacDermott. The judge had jurisdiction to entertain the plaintiffs' application under s. 22, and was not precluded either by the order of the House of Lords or by s. 32A from giving them liberty to amend the four claims so as to render them valid.

Per Lord Simonds, Lord Normand and Lord Oaksey. *Quære*, whether the judge had jurisdiction to allow the amendments.

Decision of the Court of Appeal, (1949) 66 R. P. C. 253, affirmed.

APPEAL from the Court of Appeal (Somervell and Evershed, L.JJ., and Wynn-Parry, J.).

The appeal arose out of a patent action in which the appellants were the plaintiffs and the respondents were the defendants. The plaintiffs, being the proprietors of letters patent, brought an action for infringement against the defendants, who counter-claimed for revocation. On appeal to the House of Lords it was held that, while claims 1 to 4 of the specification were too wide and invalid on the ground that the scope of the monopoly claimed was not sufficiently and clearly ascertained, claim 5 (the only remaining claim) was valid and infringed: *Raleigh Cycle Co. Ld.* v. *H. Miller & Co. Ld. (No.* 1) (1).

On further proceedings in the Chancery Division, Vaisey, J., allowed the plaintiffs to amend claims 1 to 4. The Court of Appeal held that he had no jurisdiction to do so. The plaintiffs appealed to the House of Lords. The facts are fully set out in the opinion of Lord Morton of Henryton.

Heald, K.C., Drewe, K.C., and *Kenneth Johnston* for the appellants (plaintiffs).

Shelley, K.C., Aldous and *John Brewis* for the respondents (defendants).

The arguments sufficiently appear from their Lordships' opinions.

Their Lordships took time for consideration.

Nov. 30. LORD SIMONDS. My Lords, I have had the advantage of reading the opinion which my noble and learned friend Lord Morton of Henryton is about to deliver and, as I agree with him in thinking that this appeal should be dismissed, I will content myself with a few observations.

I am fully in accord with my Lord in thinking that, assuming that Vaisey, J., had jurisdiction to make the order which the appellants seek to restore, yet he clearly ought not to have made it, and that it would be in accordance with the principles upon which an appellate court overrules the exercise of its discretion by a lower court for your Lordships to refuse an amendment which Vaisey, J., in the exercise of his discretion thought fit to allow. When this matter first came before this House, the opinion was unanimously expressed—by myself perhaps more strongly than by others of your Lordships—that the first four claims of the patent were invalid on the ground that the scope of the monopoly claimed was not sufficiently and clearly ascertained. That this among other grounds of attack would be sustained by the respondents was clear from the outset; yet the appellants chose to contest the point up to this House and only, when after protracted litigation the issue was decided against them, sought leave to amend the specification. It may be as my noble and learned friend points out that cases will occur in which such a course is permissible, but I can see here no such circumstances as would justify it. It is at this point that in my opinion the judge fell into error. He did not give any or any sufficient weight to a consideration which in my opinion was paramount and cannot be held to have exercised his discretion properly.

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(1) [1948] W. N. 78; 65 R. P. C. 141.

This is sufficient to dispose of the appeal, and I do not think it necessary to discuss the question of jurisdiction. That is a question upon which I have felt great difficulty and I am by no means satisfied that s. 32A of the Patents and Designs Act, 1907–1946, does not create an entirely new sphere of jurisdiction in which s. 22 of the Act has no place.

I move your Lordships that this appeal be dismissed with costs.

LORD NORMAND. My Lords, I agree that the appeal should be dismissed. I am far from being persuaded that the Court of Appeal erred on the question of jurisdiction. But on the question of discretion I agree with the opinion of my noble and learned friend Lord Morton of Henryton, which I have had the advantage of reading in print.

It must have been apparent to the appellants from the cross-examination of their first witness in the trial that an attack was to be made on the validity of the first four claims and what the basis of the attack was. They were then, in my opinion, put to an election between amending these claims and continuing their action without amending while maintaining that the claims were valid. They chose the second alternative and now seek all the advantages of amendment which they then rejected. Without going so far as to say that a patentee can never in any circumstances be allowed to do this, I think that he cannot be allowed so great an advantage except in very special circumstances which are not here present.

I would not interfere with the exercise of the judicial discretion unless I were satisfied that the judge had taken too narrow a view of the principles which should govern its exercise. He did not take into account the public interest which is injured when invalid claims are persisted in so that inventors are illegitimately warned off the area of the art ostensibly monopolized by the claims. And he failed to take into account the interest of the patentee's opponents in the litigation. The amendment of the claims at the time when the defendants' objections to them were disclosed by cross-examination would certainly have simplified and shortened the proceedings and might even have brought them to an end.

LORD OAKSEY. My Lords, I have had the advantage of reading the opinions of the noble and learned Lord on the woolsack and of my noble and learned friend Lord Normand. I agree with them and have nothing to add.

LORD MORTON OF HENRYTON. My Lords, it will be convenient to refer to the present appellants as "the plaintiffs" and to the present respondents as "the defendants".

The plaintiffs are the owners of Letters Patent No. 468065 for "improvements in electric generators". It is not necessary to describe the plaintiffs' invention at this stage, but it should be stated that the complete specification contained five claims.

On July 18, 1939, the plaintiffs issued a writ against the defendants, alleging infringement of their patent and claiming the usual relief in an infringement action. The defendants alleged that the patent was invalid, denied infringement and counter-claimed for revocation of the patent.

The trial of the action was delayed owing to the war and took place before Vaisey, J., in 1945. The learned judge held the patent to be invalid, dismissed the action and on the counter-claim ordered the patent to be revoked. The plaintiffs appealed to the Court of Appeal, and that court unanimously upheld the order of Vaisey, J., but for reasons different from those given by him. The plaintiffs appealed to this House, and on February 13, 1948, this House, by a majority of three to two, declared that claim 5 of the patent was a valid claim and had been infringed but unanimously held that claims 1 to 4 were invalid. The order of the Court of Appeal was reversed, the judgment of Vaisey, J., was discharged, and it was ordered: "That the cause be, and "the same is hereby, remitted back to the Chancery Division of "the High Court of Justice to determine what, if any, relief "should be granted to the appellants in accordance with s. 32A "of the Patents and Designs Acts, 1907–1946, and to do therein "as shall be just and consistent with this judgment". The last thirteen words of this order were not included in the order as agreed in the speeches of the majority, but were inserted, I understand, in accordance with a long-standing custom. I need not further comment upon this matter, as counsel on both sides conceded that these words added nothing to the effect of the order.

Section 32A of the Patents and Designs Acts, 1907–1946 (hereafter called "the Act"), is as follows:—"Where the court in "any action for infringement of a patent finds that any claim in "the specification, in respect of which infringement is alleged, is "valid, but that any other claim therein is invalid, then, not-"withstanding anything in section twenty-three of this Act— "(*a*) if the patentee furnishes proof to the satisfaction of the "court that the invalid claim was framed in good faith and with "reasonable skill and knowledge, or if the patent is dated before "the commencement of the Patents and Designs Act, 1932, the "court shall, subject to its discretion as to costs and as to the "date from which damages should be reckoned, and to such "terms as to amendment of the specification as it may deem "desirable, grant relief in respect of any valid claim which is "infringed without regard to the invalidity of any other claim in "the specification and in exercising such discretion the court "may take into consideration the conduct of the parties in "inserting the invalid claim in the specification or permitting "that claim to remain there;

"(*b*) if the patentee does not furnish proof as aforesaid, and "the patent is dated after the commencement of the Patents and "Designs Act, 1932, the court shall not grant any relief by way "of damages or costs, but may grant such other relief in respect "of any valid claim which is infringed as to the court seems just, "and may impose such terms as to amendment of the specification as a condition of granting any such relief as it may deem "desirable;

"(*c*) if a counter-claim for revocation of the patent has been "made in the action on the ground of the invalidity of any claim "in the specification, the court may postpone the operation of "any order made thereon during such time as may be requisite "for enabling the patentee to effect any amendment of the "specification pursuant to terms imposed upon him and may "attach any such other condition to any order to be made on the "counter-claim as the court may deem desirable".

It should be stated at once that at no time in the subsequent proceedings did the plaintiffs attempt to furnish proof that the four invalid claims were framed in good faith and with reasonable skill and knowledge. The result was that the relevant portion of s. 32A was sub-para. (*b*).

On March 18, 1948, on the application of the plaintiffs the order of this House was made an order of the High Court of Justice. The order made by the High Court was inaccurate in that it recited the order of this House as remitting "the action "and counter-claim", instead of "the cause", back to the Chancery Division. I incline to the view that the counter-claim was not in fact remitted by this House, as the judgment of Vaisey, J., revoking the patent was discharged and the cause was only remitted back to the Chancery Division for the limited purpose mentioned in the order of this House, which contained no reference to the counter-claim. I do not pause to consider the matter further, as I think it is of no importance for the decision of the questions now before your Lordships. Subsequently an application was made to Vaisey, J., for directions as to the further hearing of the matter, and the learned judge directed that both parties should give notice of motion asking for an order in the form in which they respectively contended an order should be made. Accordingly, by notice of motion dated April 30, 1948, the defendants asked for an order that the Patent No. 468065 be revoked and for further relief which need not be specified, and the plaintiffs by notice of motion dated May 26, 1948, asked for an injunction to restrain infringement of claim 5, and for a certificate that the validity of claim 5 came into question, and offered, as a condition for relief to be granted in respect of claim 5, to submit to an order that they should " apply " to the Comptroller-General of Patents for leave to amend the " complete specification of the said letters patent having due " regard to the decision of the House of Lords herein ".

Both motions came on for a preliminary hearing before Vaisey, J., on July 1 and 2, 1948, and as a result of a discussion which then took place the plaintiffs amended their notice of motion by striking out the reference to an application to the Comptroller-General, and by substituting therefor an application to the court that " the plaintiffs be granted leave to amend the " complete specification of Letters Patent No. 468065 as indi" cated in red ink in the copy of the said specification certified " by the Comptroller-General of Patents delivered with this " amended notice of motion ". The amendments suggested were directed mainly to amending claims 1 to 4 inclusive, with a view to eliminating the features which led this House to find these claims invalid, and making a restatement, in the body of the specification, of the discovery which the plaintiffs had made.

On July 5, 1948, Vaisey, J., ordered that the plaintiffs were to be at liberty to proceed with their amended motion for leave to amend the complete specification, and gave certain directions as to the filing of affidavits and other matters. There can, I think, be no doubt that the plaintiffs' motion purported to be an application under s. 22 of the Act. Both motions were heard by Vaisey, J., in November, 1948. The learned judge did not grant an injunction, as only a single instance of infringement had been proved, but he gave the plaintiffs liberty to apply for an injunction. The order continued: " And it is ordered that the plaintiffs " be at liberty to amend the complete specification of Letters " Patent No. 468065 in the manner shown in the schedule " hereto ". The schedule gave effect to the amendments asked for by the plaintiffs' notice of motion. The learned judge certified that the validity of claim 5 came into question, and dismissed the defendants' motion for revocation.

The defendants appealed to the Court of Appeal and judgment was delivered in that court on May 19, 1949. The Court of Appeal decided that there was no jurisdiction to amend under s. 22 and ordered that, " as a term of relief granted to the " plaintiffs ", the first four claims of the specification should be struck out. The restatement of the discovery was allowed to remain, the defendants not objecting to this.

The preliminary questions which arose for determination by your Lordships' House are, first, whether Vaisey, J., had jurisdiction to entertain the plaintiffs' application under s. 22 of the Act, and, secondly, whether the learned judge was precluded, either by the order of this House of February 13, 1948, or by the terms of s. 32A of the Act, from giving the plaintiffs liberty to amend the first four claims in their specification with a view to rendering these claims valid.

It is convenient at this point to set out the relevant portions of s. 21 and the whole of ss. 22 and 23 of the Act:

Section 21: "(1) An applicant at any time after acceptance "of his complete specification or a patentee at any time may, by "request in writing left at the Patent Office, seek leave to amend "his specification, including drawings forming part thereof, by "way of disclaimer, correction, or explanation, stating the nature "of, and the reasons for, the proposed amendment. . . . (6) No "amendment shall be allowed that would make the specification, "as amended, claim an invention substantially larger than or "substantially different from the invention claimed by the "specification as it stood before amendment. . . . (8) This "section shall not apply when and so long as any action for "infringement or proceeding before the court for the revocation "of a patent is pending."

Section 22: "In any action for infringement of a patent or "proceedings before a court for the revocation of a patent the "court may by order allow the patentee to amend his specifica"tion by way of disclaimer, correction or explanation in such "manner, and subject to such terms as to costs, advertisement "or otherwise, as the court may think fit: Provided that no "amendment shall be so allowed that would make the specifica"tion, as amended, claim an invention substantially larger than, "or substantially different from, the invention claimed by the "specification as it stood before the amendment, and where an "application for such an order is made to the court notice of the "application shall be given to the comptroller, and the comp"troller shall have the right to appear and be heard, and shall "appear if so directed by the court."

Section 23: "Where an amendment of a specification by way "of disclaimer, correction, or explanation, has been allowed "under this Act, no damages shall be given in any action in "respect of the use of the invention before the date of the "decision allowing the amendment, unless the patentee estab"lishes to the satisfaction of the court that his original claim was "framed in good faith and with reasonable skill and knowledge."

These three sections appeared in their present form in the Act

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of 1907, and formed a complete code as to the amendment of specifications. As I read ss. 21 and 22, they give to every patentee, as defined by s. 93 of the Act, a statutory right to apply at any time for leave to amend his specification. If no action for infringement or proceeding before the court for revocation of a patent is pending, the application is to be made at the Patent Office; if any such action or proceeding is pending, the application is to be made to the court; but at no time is the patentee deprived of the right to make his application either under s. 21 or under s. 22. Section 32A was brought into the Act, in a shorter form than that which it now bears, by s. 9 of the Patents and Designs Act, 1919, and assumed its present form by reason of s. 5, sub-s. 2, of the Patents and Designs Act, 1932.

As to the first question already stated, it was contended by counsel for the defendants that on May 26, 1948, when the plaintiffs gave their notice of motion, and on November 26, 1948, when Vaisey, J., made his order thereon, there was not any existing "action for infringement of a patent" in which the court could, by order under s. 22, allow the plaintiffs to amend their specification.

My Lords, I am quite unable to accept this contention. In 1939 the plaintiffs commenced the action 1939 R. No. 1405. On February 13, 1948, this House remitted that same action to the Chancery Division to determine what, if any, relief should be granted to the appellants in accordance with s. 32A; in other words, to determine what relief, if any, should be granted to the plaintiffs in respect of the one valid claim which had been infringed. Until the Chancery Division had determined that question it seems to me impossible to say that the action 1939 R. No. 1405 had ceased to exist as an action. If this is so, the plaintiffs had a statutory right to apply in that action, under s. 22, for leave to amend their specification and the learned judge had jurisdiction to hear and determine that application. I can find no words in s. 32A which have the effect of suspending or abrogating the statutory rights of a patentee under ss. 21 and 22, and in my opinion the plaintiffs were right in thinking that s. 22 was the appropriate one in the circumstances. The application having been made, it was the duty of the learned judge to deal with it. For these reasons I am of opinion that the first objection raised to the jurisdiction of Vaisey, J., fails.

I must now consider the second question already stated. Counsel for the defendants submitted that Vaisey, J., had no jurisdiction to direct amendment of the invalid claims 1 to 4, either directly or through the medium of an application under s. 22. Their first argument was that the only "relief" which the learned judge was authorized to give under clause (*b*) of s. 32A was "relief in respect of any valid claim which is "infringed", and that if the learned judge directed or allowed amendment of claims 1 to 4 he would be granting relief in respect of invalid claims. In my view this argument is ill-founded. Section 32A (*b*) deals with two matters, the granting of "relief "in respect of any valid claim" and the imposing of terms as to amendment of the specification, as a condition of such relief. The word "relief" in the context in which it occurs does not, in my view, include any amendment of the specification. It applies only to relief granted against the defendants. The court is precluded from granting "any relief by way of damages or "costs" but may grant "other relief" (e.g., an injunction) in respect of any valid claim which is infringed. The plaintiffs cannot and do not contend that the court could amend claims 1 to 4 under the words now under discussion.

The defendants' second argument was that to amend claims 1 to 4, so as to render them valid is to confer a benefit on the patentees, and the use of the word "impose" shows that the terms imposed as a condition of granting relief must be burdensome and not beneficial to the patentees. Therefore, they say, the judge exceeded his jurisdiction under s. 32A in allowing the plaintiffs to amend claims 1 to 4 and the order of this House only enabled him to act within the powers conferred upon him by s. 32A. The defendants suggest that it is unlikely that the legislature intended to give the court an opportunity of conferring this benefit on patentees who have persisted in upholding all their claims and have failed to uphold some of them. They concede that the court can grant relief in respect of any valid claim which is infringed without imposing any terms as to amendment, but they contend that, if any such terms are imposed, they cannot include a term that the invalid claims shall be amended in such a way as to render them valid.

My Lords, in my view this argument also fails. In the first place, as I have already said, I think that Vaisey, J., had jurisdiction to entertain the plaintiffs' application under s. 22 of the Act, and s. 22 does not prohibit the court from allowing the patentees to amend invalid claims. In the second place, even if the judge is to be considered as exercising jurisdiction under s. 32A only, I am wholly unable to discover in s. 32A any such limitation on the power of the court as is suggested by the defendants. I fail to see why, as a matter of construction, the phrase "terms as to amendment" should be read as excluding a term that the patentees shall so amend their invalid claims as to render them no longer free from objection. The court would naturally be reluctant to leave invalid claims in a patent which will still remain on the register of patents, and this undesirable result can be avoided in either one of two ways, by striking out the invalid claims or by directing the patentees to amend them. I cannot find that either of these ways is precluded by s. 32A, and it seems to me that the court is "imposing terms" if it directs the patentees to do either one or the other. Moreover, the defendants concede that the court need not impose *any* terms under s. 32A (*b*), and if relief were granted without any terms being imposed, the patentees could thereafter apply to the Patent Office under s. 21 for leave to amend their invalid claims: see *J. & S. Eyres Ld.* v. *John Grundy Ld.* (2). If this is so, it would seem strange if the court had no jurisdiction to avoid multiplicity of proceedings by directing the patentees to amend these claims as a condition of granting relief under s. 32A. I would add, however, that cases must be rare indeed in which the court would be content to allow the invalid claims to remain on the register, leaving it to the patentee to amend them or not as he thinks fit.

As to the contention that any terms imposed under s. 32A must be burdensome and not beneficial, I say first that I can find no such limitation in s. 32A, and secondly that I cannot see where the line is to be drawn. A patentee might prefer to leave wide claims on the register, so as to discourage possible competitors who might not know that the claims had been held invalid, rather than to have the claims narrowed by amendment. In such a case, if this part of the defendants' argument is right, amendment of the invalid claims could be "imposed" upon the unwilling patentee; but the court could not "impose" similar terms upon a patentee who was anxious to put right his invalid claims. In my view the word "impose" simply will not bear the heavy burden which the defendants seek to place upon it.

The defendants' suggestion as to the probable intention of the legislature in using the word "impose" is mere guess-work. I can well imagine that in the majority of cases the terms imposed upon a patentee under s. 32A would be unwelcome to him; but that is a matter of discretion, and for the moment your Lordships are only considering a question of jurisdiction.

I have carefully considered all the cases referred to in the course of the argument, but I do not think that they throw any light on the question of jurisdiction now under consideration.

My Lords, I think that Vaisey, J., had a twofold intention: he meant to grant the plaintiffs leave under s. 22 to amend their invalid claims and also to grant them relief, under s. 32A, in respect of claim 5, on condition that the invalid claims were so amended. In my view he had jurisdiction to carry out his twofold intention. I do not think that this twofold intention is clearly expressed in his order, but I think that this is a matter of form and not of substance.

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(2) (1939) 56 R. P. C. 253, 263.

The next question for determination is whether Vaisey, J., in the exercise of his discretion, ought to have allowed the plaintiffs to amend their invalid claims 1 to 4. This question was argued before the House on the assumption that the proposed amendments do not infringe the statutory prohibition contained in the proviso to s. 22. It was not necessary for the Court of Appeal to decide this question as to discretion, since that court was against the plaintiffs on the issue of jurisdiction, but all the members of that court were inclined to disagree with the manner in which Vaisey, J., had exercised his discretion.

My Lords, it is, of course, important to preserve the established principles as to the reversal by an appellate court of an order made by the judge below on the exercise of his discretion. They were recently restated by Viscount Simon, L.C., in *Charles Osenton & Co.* v. *Johnston* (3). Bearing these principles in mind, I am of opinion that the learned judge should have ordered the first four claims to be struck out, as a condition of granting relief in respect of the fifth claim, and should have refused leave to amend these four claims. I think that he gave insufficient weight to the considerations to which I shall shortly refer. But I desire to say at the outset that I do not weigh on the scales against the plaintiffs the fact that they never furnished proof that the invalid claims were framed in good faith and with reasonable skill and knowledge. The plaintiffs were not in a position to claim any damages, because only one infringing article had been manufactured, and in these circumstances it was quite natural for them to refrain from giving any evidence on the matters just mentioned. The only result of their giving no such evidence is that the discretion of Vaisey, J., arose under sub-para. (*b*) of s. 32A and not under sub-para. (*a*).

The reasons which have led me to differ from the learned judge on this matter must now be stated. I start with this fact, that the unamended claim 1, unless its terms can be held to be modified by some limitation imported from the body of the specification, clearly covered a territory which extended far beyond the plaintiffs' invention. The claim was in the following terms: "1. An electric generator for a cycle comprising a multi-"polar, annular, permanent magnet and a wound multipolar "armature mounted within the hub of the cycle wheel, "characterised in that the multipolar permanent magnet is fixed "to the wheel hub and that the armature is fixed to the wheel "spindle, whereby all the rotating parts of the generator are "fixed relatively to the rotating parts of the hub and all the "stationary parts are fixed relatively to the stationary wheel "spindle".

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(3) [1942] A. C. 130, 138.

When this case was last before your Lordships' House I said (4): " 'Multipolar' is a technical word having a simple "and well-established meaning. It means 'having not less than "'four poles'. I can find nothing in the context which would "justify giving any other meaning to the word. If this is its "meaning, it is clear that the claim covers constructions which "would be quite useless for a cycle; for instance, it would cover "an electric generator wherein both the magnet and the armature "had only four poles. It is said, however, on behalf of the "appellants that the words 'for a cycle' mean 'suitable for "'lighting a pedal cycle' and exclude any construction which "would not be useful for the purpose. In my view if the word "'multipolar' is given any meaning other than that which it "ordinarily bears, claim 1 becomes ambiguous and the appellants "have failed sufficiently and clearly to ascertain the scope of "the monopoly claimed. I agree with the view of the Master "of the Rolls (5) that 'the worker in the art who has to discover "'the boundary which separates the open from the forbidden "'territory is . . . entitled to a good deal of sympathy, since "'he has to find the definition of the boundary in the pregnant "'words "for a cycle" and to test the light that he obtains by "'a novel and ex hypothesi unknown standard' ". All the members of your Lordships' House were in agreement in thinking claim 1 invalid, my noble and learned friend Lord Simonds (6) observing that the skilled workman was "left in the dark whether "any number in the whole range of multipolarity from four to "infinity is within the scope of the monopoly".

It may be said that the plaintiffs could hardly foretell what your Lordships' views would be, but this defect in claim 1 was brought pointedly to the plaintiffs' attention at a very early stage in the first trial before Vaisey, J. The first witness called for the plaintiffs was Doctor W. H. Eccles and Mr. Shelley, in cross-examining him, put the point with the utmost clarity. At that early stage, therefore, the plaintiffs were faced with a choice. They could have applied to Vaisey, J., under s. 22 of the Act, for leave to amend claim 1 so as to state in plain terms the boundaries of the monopoly which they claimed; or they could have left the claim unamended, in the hope that the court would hold that the apparent width of it must be restricted by reference to the body of the specification. They took the latter course, and before Vaisey, J., they succeeded in repelling the defendants' attack upon the claims. The learned judge, however, dismissed the action and revoked the patent on the ground that it lacked subject-matter.

(4) (1948) 65 R. P. C. 141, 157.

(5) (1946) 63 R. P. C. 113, 138–9.

(6) 65 R. P. C. 141, 150.

I need not trace again the course which the action subsequently took. The plaintiffs persisted in trying to uphold claim 1 in the Court of Appeal and in this House and finally failed to uphold it in this House. Claims 2, 3 and 4 admittedly could not stand if claim 1 fell.

My Lords, I do not think that Vaisey, J., attached sufficient importance to the attitude which the plaintiffs chose to adopt. They had, as I have pointed out, the plainest possible warning of the defect in claim 1, at the earliest possible stage of the first trial before Vaisey, J., but they took no steps to redefine in clearer terms the scope of the monopoly which they claimed. I cannot tell what course of action the defendants would have taken if the plaintiffs had amended claims 1 to 4 at that stage. The trial might have continued on other issues; but the defendants have undoubtedly been put to great trouble and expense in fighting the issue as to claims 1 to 4 right up to your Lordships' House.

There is another important aspect of the matter, the effect of these unjustifiably wide claims upon the public in general, and upon persons interested in this art in particular. The application date of Patent No. 468065 was November 26, 1935. The complete specification was left at the Patent Office on November 26, 1936, and was accepted on June 28, 1937. Thus, for a considerable period these wide claims have remained on the Register of Patents. Mr. Heald argued that no harm has resulted, because, owing to the war, there was no manufacture of bicycles during a large part of this period. This fact may well have made the consequences less serious, but it is impossible to say how many inventors and workers in this art may have been deterred from research and experiment by reason of the fact that the plaintiffs had marked out so wide a territory as their own.

Mr. Heald cited to your Lordships a decision of mine in *Mullard Radio Valve Co. Ld.* v. *British Belmont Radio Ld.* (7). I do not wish to delay your Lordships by discussing that case at length as I do not think it is of any real assistance. The invention there in question was one which it was extremely difficult to describe and claim in apt terms, and this may have induced me to take a kindly view of the patentees' application to amend. Moreover, although the case was decided in the Court of Appeal on other grounds, the only member of that court who mentioned the question of discretion indicated that I might have been too lenient to the patentees (8).

My Lords, I can conveniently summarize my views on this part of the case by saying that in the absence of exceptional circumstances a patentee should not be allowed to amend invalid

(7) (1938) 55 R. P. C. 197.

(8) (1939) 56 R. P. C. 1, 21.

claims after he has sought to maintain their validity up to this House; and that I can find no exceptional circumstances in the present case which could justify the judge in granting the plaintiffs this indulgence. For this reason I think that the Court of Appeal arrived at the right conclusion, although I have already expressed my dissent from the views of that court on the question of jurisdiction. I have not, of course, formed any views on the question whether the amendments allowed by Vaisey, J., were open to any objection under the proviso to s. 22. That question has not been argued.

I would dismiss the appeal. I see no reason to disturb the order as to costs made by the Court of Appeal, but the plaintiffs must pay the costs of this appeal.

LORD MACDERMOTT. My Lords, the first question for consideration is whether Vaisey, J., on the matter being remitted pursuant to the order of this House of February 13, 1948, had jurisdiction to amend, or to give leave to amend, the specification so as to remedy the defects in the claims which were declared invalid on the first appeal to your Lordships. The facts and circumstances bearing upon this question have already been fully stated and I do not propose to repeat them.

Section 32A of the relevant Act made provision for a further procedure in an action for infringement which was not possible when s. 22 was first enacted. If, however, the opening words of s. 22—" In any action for infringement . . ."—must now be read as including proceedings under s. 32A, it would seem that the right of a patentee to apply to the court for leave to amend his specification under s. 22, and the correlative power of the court to accede to such application, would persist in cases where resort was had to s. 32A until the proceedings thereunder were at an end.

Vaisey, J., as I read his judgment and order, took the view that this was the position and that he had full jurisdiction while dealing with the case under s. 32A, according to the terms of the remit, to entertain and grant an application made by the patentees under s. 22 for leave to make the amendments they wanted, and that irrespective of whether the amendments sought were "desirable" from the point of view of the court as a condition of granting relief under s. 32A. The opinion of the learned judge is, I think, put beyond doubt by the passage in which he says (9): " Therefore . . . I have come to the conclusion that the suggested " amendments . . . are not outside the terms of s. 22, under " which I conceive myself to be acting rather than under " s. 32A (*a*) and (*b*), which relates, as I have said earlier in this

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(9) (1949) 66 R. P. C. 23, 44.

"judgment, not to the allowing of amendments but to the "imposition of terms as to amendment. It may be regarded "from one point of view that I am imposing terms, but it is a "curious expression to use when I am really allowing the "plaintiffs to make the amendments for which they ask, and so "it is not quite a suitable use of language to say the court is "imposing terms upon a man who comes and asks that such "terms should be acceded to him under the other section".

It is obvious that recourse cannot be had to the s. 32A procedure until the litigation to which it relates is in its final stages. Before s. 32A can apply at all, the salient issues in the suit must have been settled. One claim or more must have been held valid and one or more invalid; there must have been a finding of infringement in respect of one at least of the valid claims; and any defences alleging invalidity of the patent on grounds other than those relating to the validity of the claims must have been decided in favour of the patentee. In these circumstances I think it has to be admitted that to allow the patentee to appeal to the jurisdiction conferred by s. 22, in order to rectify his invalid claims, because proceedings under s. 32A are under way and the action is therefore still technically on foot, would tend on occasion to produce anomalies and confusion. If such a course were open to the patentee he would not only be at liberty, after defending a defective claim right up to the point of adjudication, to take steps in the same action to remedy the defect, but the taking of such steps would, I think, involve a strange inconsistency. He would be seeking a form of relief under s. 32A which could only be granted on the basis that the court had found the specification to contain invalid as well as valid claims; and he would be using that procedure as an extension of the action so as to enable him to ask the court therein—that is, under s. 22—for leave to avoid, by amendment, the full effect of the finding on which the jurisdiction under s. 32A depended.

These considerations at first appeared to me to offer strong support for the view that on the true construction of s. 22 the words "In any action for infringement . . ." have not been enlarged beyond their original scope so as to include proceedings under s. 32A and thus enable the appellants to move, as they have done, to obtain amendment under s. 22. On reflection, however, I am disposed to think that this interpretation would do undue violence to the language and scheme of the Act concerning amendments. It seems to me that ss. 21 and 22 were intended to cover between them the whole field of amendment in point of time. By their terms they are mutually exclusive, so that if an action is pending s. 21 is excluded and s. 22 applies. I do not think the insertion of s. 32A, outside the fascicule headed

"Amendment of Specification" and in that headed "Legal "Proceedings", altered this. Its provisions must be operated in an action for infringement, and while they are being operated resort to s. 21 seems clearly out of the question. In such case had it been intended to depart from the original scheme and to preclude resort also to s. 22 I cannot but feel that some attempt would have been made to modify the opening words of s. 22. Further, it is to be observed that s. 22 confers its jurisdiction in wide terms and (unlike s. 21) without the need of a preliminary application. I do not see why the power thus conferred should be denied to the court when acting under s. 32A.

Whether or not that section itself contains a power of amendment—and that is a question which I need not now decide —I think its wording, particularly the expressions "terms as to "amendment" in paras. (*a*) and (*b*) and "to effect any amend- "ment" in para. (*c*), contemplates rather than repels the idea of an exercise of jurisdiction under s. 22; and if this is so it is all the more reason why the opening words of s. 22 should have the scope of their natural meaning. This reasoning does nothing to remove the likelihood of anomalies to which I have referred and the question remains one of difficulty. But, on the whole, I think the sounder construction must regard the language of the statute and leave such anomalies as may arise to be dealt with in the exercise of the broad judicial discretion it confers.

If I am correct in this it means that Vaisey, J., had jurisdiction to follow the course he actually took. If, however, I am wrong to the extent that the learned judge had no jurisdiction to entertain an application by the appellants under s. 22, a further point remains, namely—was it competent for the court in the exercise of the jurisdiction conferred by s. 32A, and without any application under s. 22, to provide for the validation by amendment of the invalid claims? This, like the previous question, must, of course, be regarded for present purposes as an abstract problem and without reference to the merits of the appellants' case. So regarding it I think the answer should be in the affirmative. I shall state my reasons as shortly as possible, but first I would observe that the point does not, in my view, depend either upon the proper interpretation of the order of February 13, 1948, or yet upon whether the power of the court to provide for such amendment as it thinks fit to make a condition of relief under s. 32A, is derived solely from that section.

In the course of the argument it was conceded, very properly to my mind, that under s. 32A the court could grant relief either (a) without requiring any step to be taken in respect of the invalid claims which might be left as they were for the patentee, if he so chose, to seek amendment of under s. 21 after the litigation was over, or (b) conditionally upon the making of an amendment deleting the defective claims. It may be that action along one or other of these lines would be adequate to meet most cases that are likely to arise. But s. 32A was widely drawn and patents are so infinitely varied in their subject-matter and in the circumstances of their exploitation and infringement that the discretion of the court ought, in my opinion, to be saved from any restrictions which have not been imposed by the legislation either expressly or as a matter of necessary implication. If the discretion is wide enough to enable the court to say in one case that the patentee will get relief provided he takes steps, in the public interest, to remove the bad claims by excision, and, in another, that relief will be given unconditionally and with full liberty to amend subsequently under s. 21, I am unable to find anything in the Act to substantiate the view that the court of its own motion may not take an intermediate course and say to the patentee something like this: "You will get relief, but on terms: "in your case it is not in the public interest that your specifica"tion should continue to include invalid claims. You must, "therefore, take steps to amend. But your merits are such that "it would be unfair if you were compelled to delete your invalid "claims in their entirety as in that event your addition of "reformed claims to take their place by way of amendment "would be virtually impossible under s. 21, having regard to the "provisions thereof relating to 'disclaimer, correction or explana"'tion'. The amendment you will have to procure will, "therefore, only be such as will make your bad claims good". The occasions on which an order of that sort would be appropriate may not be frequent. But I do not think it can be said that such an order could never be appropriate or that it would not mean an imposing of terms within s. 32A (*b*). There are times when it may be to the commercial advantage of a patentee to leave a claim, wide or vague enough to be bad, unamended, and I see no reason why the court should not be free to prevent this in cases which do not call for the deletion of all but the valid claims.

If, then, as I would hold, Vaisey, J., had jurisdiction to provide for the validation of the invalid claims by amendment, the question arises whether there is ground for interfering with the manner in which he exercised his discretion, that is to say, with the amendments he gave the appellants liberty to make in claims 1, 2, 3 and 4. In considering this question it will be convenient to assume, contrary to the submission of the respondents, that these amendments are apt to cure the defects in these claims and are permissible according to the terms of s. 22, if that section is applicable.

My Lords, on this branch of the case your Lordships were invited by the respondents to hold that the invalid claims were not framed in good faith and manifested an attempt on the part of the appellants to claim, for their own commercial advantage, beyond the proper ambit of their invention. If this were the case, the order of Vaisey, J., could not be supported and would never, I am sure, have been made. I am quite unable, however, to find any substance in the charge thus advanced. I do not think the evidence justifies the conclusion that the use of the word "multipolar" had any ulterior motive or was more than loose drafting. In its lower limits the word covered what was, and seemed likely to remain, a useless part of the field claimed. In its upper range the word covered what was not sustained by the inventive step but was impracticable at the date of the specification. This impracticability might, it is true, have disappeared in course of time as the knowledge of metallurgy increased. But the circumstances do not suggest that the appellants had this possibility in mind and the respondents made no point about claims 1 to 4 being bad, because an upward limit had not been placed on "multipolar", until after Lord Greene, M.R., had adverted to the matter in his judgment on the first appeal to the Court of Appeal.

This part of the respondents' case was also founded on the language of s. 32A, it being contended that if a patentee seeking relief thereunder did not furnish proof that his invalid claims were framed "in good faith and with reasonable skill and "knowledge" the court was entitled to assume that the claims were not framed in good faith. In my opinion the section does not go this length. The relief permitted by paragraphs (*a*) and (*b*) respectively depends on whether the patentee has furnished such proof or not; but if he elects not to furnish such proof and to apply under paragraph (*b*) I think the only necessary consequence is to restrict the jurisdiction of the court as to the nature of the relief it may give. I see nothing in the section to convict the patentee of a lack of good faith merely because he has not proved what is needed to bring him within paragraph (*a*).

With this question of good faith out of the way, the issue as to discretion seems to me to turn mainly on whether Vaisey, J., paid due regard to the appellants' conduct in seeking the material amendments. In the circumstances of the case the appellants start under difficulties and it is but right that the delay they have made in seeking to amend the claims should weigh heavily against them. On the other hand, their invention is meritorious and their delay in seeking liberty to amend does not seem to have prejudiced the public interest or that of the respondents, whose chief anxiety in the matter appears to be that they should be free to exploit the appellants' discovery as fully and as soon as possible.

My Lords, I do not propose to review the facts and considerations bearing upon the discretion that Vaisey, J., was called on

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to exercise. I am not sure that I would have reached the conclusion he reached. But that is not the test. I think the learned judge applied himself with great care to the difficult and unusual task which confronted him and I find myself unable to say that he left out of account or failed to pay due regard to any material element in the case.

I would, therefore, be in favour of restoring the order of Vaisey, J., subject to my assumptions as to the propriety and sufficiency of the amendments being made good. As, however, your Lordships take a different view on the question of discretion no useful purpose would be served by a further examination of these assumptions and I refrain from expressing any opinion on the points they raise.

Appeal dismissed.

Solicitors: *Steadman, Van Praagh & Gaylor; Woodham Smith, Borradaile & Martin.*

[HOUSE OF LORDS]

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Nov. 2, 3, 6;
Dec. 13.

OPPENHEIM . . . . APPELLANT;

AND

TOBACCO SECURITIES TRUST CO. LD.
AND OTHERS . . . . RESPONDENTS.

Charity — Settlement — Trust for education — Children of employees or former employees of company—Validity.

By a settlement trustees were directed to apply certain income "in providing for . . . the education of children of employees or "former employees" of a British limited company or any of its subsidiary or allied companies. The employees so indicated numbered over 110,000.

Held, (per Lord Simonds, Lord Normand, Lord Oaksey and Lord Morton of Henryton, Lord MacDermott dissenting) that, though the group of persons indicated was numerous, the nexus between them was employment by particular employers, and accordingly the trust did not satisfy the test of public benefit requisite to establish it as charitable.

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

In re Compton, [1945] Ch. 123, and *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund*, [1946] Ch. 194, approved.
In re Rayner (1920) 89 L. J. (Ch.) 369, disapproved.
Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal (Somervell and Jenkins, L.JJ., and Vaisey, J.).

The facts, stated by Lord Simonds, were as follows:—On March 24, 1930, John Phillips and Elizabeth Miller Phillips, his wife, executed a settlement whereof the respondents, Tobacco Securities Trust Co. Ld., were the trustees, and thereby assigned to them certain investments in the British American Tobacco Co. Ld. (hereinafter called " the company ") and their subsidiary and allied companies and certain real estate in Trinidad (together with certain heritable property in Scotland as to which no question arose in this appeal) to be held upon certain trusts during the lives of the grantors and the survivor of them and thereafter upon trust to apply the income of the trust premises " in providing for or assisting in providing for the education of " children of employees or former employees of British-American " Tobacco Co. Ld. . . . or any of its subsidiary or allied com- " panies in such manner and according to such schemes or rules " or regulations as the acting trustees shall in their absolute " discretion from time to time think fit and also at the discretion " from time to time of the acting trustees to apply all or any " part of the corpus of the said trust for the like purposes ". The expression " acting trustees " meant the grantors during their lives and the directors for the time being of the company or in the event of a reconstruction or amalgamation of the company such other persons as were therein mentioned, in which event a variation was made also in the beneficiaries under the trust to include the children of the employees or former employees of the reconstructed or amalgamated company or any of their subsidiary companies.

Elizabeth Miller Phillips died on October 8, 1940, leaving John Phillips her universal legatee and devisee. He died on June 26, 1947, and his will was duly proved by the respondent Barclays Bank (Dominion, Colonial and Overseas). The probate value of the trust premises was over 125,000*l.*, including 2,000*l.* which represented the proceeds of the property in Scotland. It appeared that in Trinidad the English common law and doctrines of equity had been in force since 1848.

In these circumstances the question arose whether the trust was a valid trust. It was clear that it created a perpetuity; it was therefore invalid unless it could be supported as a charitable trust. The appellant, as one of the directors of the company and accordingly an " acting trustee ", contended in favour of its validity: the contrary was contended by the respondent bank, since in the event of invalidity there was a resulting trust of the trust premises to the estates of the grantors.

No evidence was given of any connexion of the grantors with the company except that John Phillips was a large stockholder. The number of employees of the company and their subsidiary and allied companies exceeded 110,000.

This question coming before Roxburgh, J., in the Chancery Division, it was conceded, and he held, that, having regard to the decisions of the Court of Appeal in *In re Compton* (1) and *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* (2) he was bound to declare the trust void except as to the property in Scotland, and on February 10, 1949, he made an order accordingly. On appeal to the Court of Appeal the same view was taken and the appeal was dismissed. In neither court was more than a formal decision given. The appellant appealed to the House of Lords.

Pennycuick K.C., and *W. A. Bagnall* for the appellant trustee. The question is whether a trust for the education of children of employees and ex-employees of a company is or is not a valid charitable trust. In order to be charitable this trust must be of a public character and this trust fulfils that requirement. A class of persons defined by reference to their occupation may constitute for this purpose a section of the public and not a collection of private individuals. This is so although the definition is based on employment by a common employer or employers; it is a question of fact and degree whether the class shall be regarded as constituting a section of the public.

The question whether a trust is of a public or a private character is elusive because the public is composed of individuals. There is no satisfactory definition of what is a public and what is a private trust. A private trust is one for a class constituted by some characteristic which its members possess on the private side of their lives or in their aspect as individuals. A public trust may be stated to be one for a class constituted by some characteristic which its members possess on the public side of their lives and in their aspect as members of a section of the community. It depends on all the circumstances whether a particular trust should be regarded as public or private.

For example, an educational trust for persons living in a particular house would not, but one for persons in a particular town or county would, be public. Where a class is defined by origin, the same sort of problem arises; an educational trust for

(1) [1945] Ch. 123.

(2) [1946] Ch. 194.

Scots or Welshmen would, but one for members of a family would not, be public.

The same principles apply in the case of trusts created by reference to occupation. A trust for educating the children of one's own domestic servants would be private. But, on the other hand, a trust defined so as to include all members of a particular profession or occupation (e.g., members of the Bar, clergymen, cotton operatives or tobacco-workers) would be public. There is no general principle that a trust for a class defined by reference to common employment is necessarily private. Such a principle would not be in accordance with the ordinary use of the words "public" and "private". In this class of trusts too the question whether a trust is to be described as being of a public or a private character depends on the particular circumstances. There are cases where there is a predominantly private relationship between employers and employees, but there are also many cases where the employees represent a section of labour employed in a particular undertaking and there is no significant private relationship, e.g., the case of a large public undertaking where there is no private relationship between the employees and some particular person. Many employees in such an undertaking do not know the names of the members of the company or of most of the directors. The number of employees is a very important factor, though numbers, of themselves, are not a conclusive test.

In the case of employment by the Crown, there is no significant private relationship between the Crown and the employees. A trust for the officers and men of the Eighth Army would be public. It cannot be that a trust for soldiers would be public and one for soldiers of the King would be private. The same considerations apply to industries operated by a national corporation (e.g., coal or the railways). A trust for the benefit of colliers or railwaymen would be public. The position cannot be different in the case of a trust, say, for the benefit of men employed on the railways by the Transport Board. In the case of smaller companies one would have to look at all the circumstances, e.g., the nature of the undertaking, the number of employees, the magnitude of the sum settled, the non-contractual personal relationship (apart from the contract of service) between the employer and the employees. In each case it is a question of degree and of fact.

In the absence of any principle that a trust for employees is necessarily private, the present case falls a long way on the right side of the line. *Hall* v. *Derby Borough Sanitary Authority* (3), *In re Drummond* (4) and *In re Rayner* (5) support the appellant's

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(3) (1885) 16 Q. B. D. 163, 170.

(4) [1914] 2 Ch. 90, 95.

(5) (1920) 89 L. J. (Ch.) 369.

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contention. *In re Compton* (7) and *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* (8) are not challenged as being correct decisions in the particular circumstances of those cases, but the observations of Lord Greene, M.R., in the former case, and of Morton, L.J., in the latter, as to trusts for the employees of a particular company, lay down too narrow a principle and cannot be supported. See also *Gibson* v. *South American Stores* (*Gath and Chaves*) *Ld.* (9) and *In re Gosling* (10). The "poor relations" cases support a wide view as to the scope of charitable trusts.

Denys Buckley for the Attorney-General (as amicus curiae at the invitation of their Lordships). One must start with the proposition that no trust can be charitable if it is enforceable by any individual or group of individuals for their own benefit. Any action for the enforcement of a charitable trust is by the Attorney-General because no individual can assert any rights. Private trusts can be enforced by private individuals and can never be charitable, whatever the benefit to the community. A charitable trust must benefit the community or an important class of it, but that does not necessarily mean that actual direct benefit, tangible or pecuniary, is conferred on any member of the public. Charitable trusts to pay money to clergymen are charitable, not because the clergymen are members of the public but because their services are thereby made available to the community: see *In re Hummeltenberg* (11). A charitable trust must fall within the Statute of Elizabeth, 43 Eliz. c. 4. In the categories of charities set out in *Income Tax Commissioners* v. *Pemsel* (12) education is prima facie beneficial to the community. In the case of educational trusts a trust to educate the heir for the time being to a particular dignity could not be charitable because the heir could enforce it. So, too, a trust to educate the issue for the time being of a particular person between the ages of five and eighteen could not be charitable.

If there is a discretion to distribute a fund among members of a class, there may be either a gift to the class with a discretion in A to select among them or a power in A to select certain persons with certain qualifications but no trust for the class as a whole: see Underhill on Trusts (10th ed.), p. 19. A person is not an object of the trust until he is selected. This makes an intelligible distinction between a private and a non-private trust. In the case of a charitable trust there is no other proper plaintiff than the Attorney-General.

(7) [1945] Ch. 123.
(8) [1946] Ch. 194.
(9) [1950] Ch. 177.
(10) (1900) 48 W. R. 300.
(11) [1923] 1 Ch. 237.
(12) [1891] A. C. 531, 583.

The right approach to this particular problem in the present case is to consider the terms of the trust and see whether the beneficiaries could enforce their own rights. There is here a valid charitable trust because no private person could sue to enforce it. Being a public trust, it is beneficial to the community since it is educational. *In re Compton* (13) was a case of a private trust and can be supported on that ground.

Russell, K.C., and *Droop* for the respondents, the company and the bank. It has been suggested that what must be found out in the case of any trust is whether A, B or C can enforce it (in which case it is private and non-charitable), or whether only the Attorney-General can enforce it (in which case it is charitable). But that is putting the cart before the horse. One must decide first whether it is charitable and then find the procedure to enforce it. The suggested test is false. One cannot approach a trust and deduce that because the Attorney-General is concerned in it therefore it is charitable. On the main question the starting point is that this gift, being unlimited in point of time, is prima facie bad as offending against the rule against perpetuities. Unless there is a valid charitable trust, it is therefore void. It is for the appellant to show that it is a charity. This cannot be a valid charitable trust unless it is of a public character, i.e., for a purpose directed to the benefit of the community or a section of the community. The appellant must therefore satisfy the court that the class of employees defined is in fact to be considered not as a private class but as a section of the public. The question is: has the settlor defined the beneficiaries by reference to a section of the community? The appellant's argument comes down to this—that the trust is charitable because a great number of people would be benefited. But if a group is defined as having in common an attribute which consists in being in a particular position vis-à-vis some individual that is not a definition of it as a section of the public. If one wishes to define a group so as to constitute it a section of the public one must do so vis-à-vis the community independently of any selected relationship with an individual. The description must be general and not particular, dealing in such matters as would be shown in a public census. The questions would be "What is he?" not "Why is he that?"; "Who is he?" not "Whose is he?"; "What does he do?" not "Whom does he "do it for?"; "Where is he?" not "Why is he there?". Suppose that a man, looking through the gates of a large estate and seeing a number of people walking about inside, asks: "Is "it open to the public?". The answer might be: "Yes, but "admission is limited to the inhabitants of Petworth". Or else it might be: "No. The people inside belong to a works outing "party of the British American Tobacco Co.". The works outing could not be said to represent members of the public. A public benefit must be open to the public as such, but it may be cut down in its availability to a section of the public, though, of course, a trust to educate all the children of all the red-haired people in a particular parish framed in the knowledge that there was only one such person would not be a good charitable trust, being, in the circumstances, private.

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(13) [1945] Ch. 123.

In the present case there can be no relevant distinction between a private and a public company. Equally it is irrelevant whether the shares of the company are or are not quoted on the Stock Exchange. By analogy, any member of the public can buy my house if I am willing to sell it, but that does not make it public. The appellant relied on the impersonal relationship between the employees and the persons running this company; but at any time, by a shift of works policy, the company might create a personal relationship. On the appellant's argument that would make a trust charitable one year which was not charitable the year before. But one cannot have a shifting charity which is now a charity and now not a charity.

As to the case of a training college attached to a large trading concern: see *In re Leverhulme* (14). A trust for education generally with an expressed preference for the education of children of employees of a particular company would be a good charitable trust. It is not sought to define public and private trusts in this connexion but it cannot be a definition of a public trust to select this one attribute of employment by a particular individual.

The possibility of abuse should be taken into consideration. If one admitted a case of this type within the class of charity it would enable a company to make their employment more attractive to their employees and to benefit their trading to a large extent at the public's expense by obtaining remission of taxation. The question is whether this is a case of benevolence to a private group or to the public generally, though cut down to a particular section of it? In the case of a public trust the indication must be to persons, not as individuals, but by relation to their position in the community. Here there is not a public trust and therefore not a valid charitable trust, for the class indicated is only a group of private individuals. Had the trust been so expressed as to provide for the education of persons engaged in the tobacco industry in a named town or county, it would have been a good charitable disposition. The right test was laid down in *In re Compton* (15), and *In re Hobourn Aero*

(14) (1943) 169 L. T. 294.

(15) [1945] Ch. 123.

Components Ld.'s Air Raid Distress Fund (16). As to the "poor "relations" cases, they are anomalous and no help can be obtained from them. It is not necessary here to argue whether they are right or wrong.

Droop following. The Attorney-General's right to sue for the enforcement of charitable trusts is founded not on statute, but on the right of the Crown as parens patriae. As to the right of private persons to sue: see the Charitable Trusts Act, 1853, ss. 17 and 20. It is important that in this case the relevant relationship depends on contract. The persons indicated were under contracts of service—contracts of personal obligations. Here there was nothing impersonal. In law the relationship was wholly personal.

Pennycuick, K.C., in reply. If in the case of a trust which is initially valid for charitable purposes the circumstances alter, it will not fail: the fund will be applicable cy-près. There is no question of a trust fluctuating between the charitable and the non-charitable. In this case the issue, short but not simple, is whether this trust is of a public or a private character. What the respondents must establish is that a class qualified by the relationship of service necessarily brings the trust within the category of private trusts. This is not so on the ordinary use of the word "private" in the English language. The qualification in each particular case is not the bare relation of service but the relationship between servants and employer in the circumstances of the particular case.

Each case is different and one must look at all the circumstances and determine whether that relationship is public or private. Is the dominant element the fact that the employees are all the servants of X, or is it the fact that they are all engaged on a particular undertaking? It is contrary to reality to treat the relationship of employer and employee as the same in each case. That relationship in the case of employment in Imperial Chemical Industries Ld. is quite different from the relationship in the case of employment in a solicitor's office. The number of employees is an important factor; so is the interest of the settlor in the business. The amount of the fund is also material. Only when all these factors are considered can it be determined whether or not the relation is public or private. In the case of a public undertaking the trust would be public. In the case of a club the relationship would be private. One should beware of the word "personal" because every human relationship is and must be personal, but that does not mean that it is necessarily private. In the case of the park, cited as an illustration on behalf of the respondents, it could only be if the owner had admitted only his friends and servants that it would be true to say that it was not open to the public. In the two other instances mentioned the park would be open to the public, with qualifications. As to the danger of abuse, that is negligible, for the advantage of making employment more attractive to the employees would be dearly bought at the cost of establishing such a trust as this. The decision in *In re Rayner* (17) has held the field for thirty years and gives a sufficiently respectable antiquity to the principle for which the appellant is contending to warrant its maintenance. The decisions on poverty and education should be harmonized in the broad rule that is contended for.

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(16) [1946] Ch. 194.

Their Lordships took time for consideration.

December 13. LORD SIMONDS. My Lords, once more your Lordships have to consider the difficult subject of charitable trusts, and this time a question is asked to which no wholly satisfactory answer can be given.

Before I turn to the authorities I will make some preliminary observations. It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community. Negatively it is said that a trust is not charitable if it confers only private benefits. In the recent case of *Gilmour* v. *Coats* (18) this principle was reasserted. It is easy to state and has been stated in a variety of ways, the earliest statement that I find being in *Jones* v. *Williams* (19), in which Lord Hardwicke, L.C., is briefly reported as follows: "Definition of charity: a gift to a "general public use, which extends to the poor as well as to the "rich . . .". With a single exception, to which I shall refer, this applies to all charities. We are apt now to classify them by reference to Lord Macnaghten's division in *Income Tax Commissioners* v. *Pemsel* (20), and, as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class, "other purposes beneficial to the community". This is certainly wrong except in the anomalous case of trusts for the relief of poverty with which I must specifically deal. In the case of trusts for educational purposes the condition of public benefit must be satisfied. The difficulty lies in determining what is sufficient to satisfy the test, and there is little to help your Lordships to solve it.

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(17) 89 L. J. (Ch.) 369.
(18) [1949] A. C. 426.
(19) (1767) 2 Amb. 651.
(20) [1891] A. C. 531, 583.

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If I may begin at the bottom of the scale, a trust established by a father for the education of his son is not a charity. The public element, as I will call it, is not supplied by the fact that from that son's education all may benefit. At the other end of the scale the establishment of a college or university is beyond doubt a charity. "Schools of learning and free schools and "scholars of universities" are the very words of the preamble to the Statute of Elizabeth. So also the endowment of a college, university or school by the creation of scholarships or bursaries is a charity and none the less because competition may be limited to a particular class of persons. It is upon this ground, as Lord Greene, M.R., pointed out in *In re Compton* (21), that the so-called Founder's Kin cases can be rested. The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a "section of the community" as to satisfy the test of public benefit. These words "section of the community" have no special sanctity, but they conveniently indicate first, that the possible (I emphasize the word "possible") beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as in *In re Compton* (22), of a number of families cannot be regarded as charitable. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

I come, then, to the present case where the class of beneficiaries is numerous but the difficulty arises in regard to their common and distinguishing quality. That quality is being children of employees of one or other of a group of companies. I can make no distinction between children of employees and the employees themselves. In both cases the common quality is found in employment by particular employers. The latter of the two cases by which the Court of Appeal held itself to be bound, *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* (23), is a direct authority for saying that such a common quality does not constitute its possessors a section of the public for charitable purposes. In the former case, *In re*

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(21) [1945] Ch. 123, 136.
(22) [1945] Ch. 123.
(23) [1946] Ch. 194.

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Compton (24), Lord Greene, M.R., had by way of illustration placed members of a family and employees of a particular employer on the same footing, finding neither in common kinship nor in common employment the sort of nexus which is sufficient. My Lords, I am so fully in agreement with what was said by Lord Greene in both cases and by my noble and learned friend, then Morton, L.J., in the *Hobourn* case (25), that I am in danger of repeating without improving upon their words. No one who has been versed for many years in this difficult and very artificial branch of the law can be unaware of its illogicalities, but I join with my noble and learned friend in echoing the observations which he cited (26) from the judgment of Russell, L.J., in *In re Grove-Grady* (27), and I agree with him that the decision in *In re Drummond* (28) "imposed a very healthy check upon the extension of the legal "definition of 'charity'". It appears to me that it would be an extension, for which there is no justification in principle or authority, to regard common employment as a quality which constitutes those employed a section of the community. It must not, I think, be forgotten that charitable institutions enjoy rare and increasing privileges, and that the claim to come within that privileged class should be clearly established. With the single exception of *In re Rayner* (29), which I must regard as of doubtful authority, no case has been brought to the notice of the House in which such a claim as this has been made, where there is no element of poverty in the beneficiaries, but just this and no more, that they are the children of those in a common employment.

Learned counsel for the appellant sought to fortify his case by pointing to the anomalies that would ensue from the rejection of his argument. For, he said, admittedly those who follow a profession or calling, clergymen, lawyers, colliers, tobacco-workers and so on, are a section of the public; how strange then it would be if, as in the case of railwaymen, those who follow a particular calling are all employed by one employer. Would a trust for the education of railwaymen be charitable, but a trust for the education of men employed on the railways by the Transport Board not be charitable? And what of service of the Crown whether in the civil service or the armed forces? Is there a difference between soldiers and soldiers of the King? My Lords, I am not impressed by this sort of argument and will consider on its merits, if the occasion should arise, the case where the description of the occupation and the employment is in effect the same, where in a word, if you know what a man does, you

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(24) [1945] Ch. 123.
(25) [1946] Ch. 194.
(26) Ibid. 208.
(27) [1929] 1 Ch. 557, 582.
(28) [1914] 2 Ch. 90.
(29) 89 L. J. (Ch.) 369.

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know who employs him to do it. It is to me a far more cogent argument, as it was to my noble and learned friend in the *Hobourn* case (30), that if a section of the public is constituted by the personal relation of employment, it is impossible to say that it is not constituted by 1,000 as by 100,000 employees, and, if by 1,000, then by 100, and, if by 100, then by 10. I do not mean merely that there is a difficulty in drawing the line, though that too is significant: I have it also in mind that, though the actual number of employees at any one moment might be small, it might increase to any extent, just as, being large, it might decrease to any extent. If the number of employees is the test of validity, must the court take into account potential increase or decrease, and, if so, as at what date?

I would end, my Lords, where I began, by saying that I concur in the reasoning of the Court of Appeal in the *Hobourn* case (30), but there are certain points in the argument for the appellant about which I should say a few words. It was urged by counsel for the Attorney-General, who was allowed to address the House, that there was here a valid charitable trust created, since there was no private person who could sue to enforce the trust. I am not persuaded that this would be so, if the trust were otherwise enforceable. But in any case the test is not a valid one. If this trust is charitable, the Attorney-General can sue to enforce it: it does not follow that it is charitable because no one else can sue to enforce it. I would also, as I have previously indicated, say a word about the so-called "poor "relations" cases. I do so only because they have once more been brought forward as an argument in favour of a more generous view of what may be charitable. It would not be right for me to affirm or to denounce or to justify these decisions: I am concerned only to say that the law of charity, so far as it relates to "the relief of aged, impotent and poor people" (I quote from the statute) and to poverty in general, has followed its own line, and that it is not useful to try to harmonize decisions on that branch of the law with the broad proposition on which the determination of this case must rest. It is not for me to say what fate might await those cases if in a poverty case this House had to consider them.✓ But, as was observed by Lord Wright in *Admiralty Commissioners* v. *Valverda* (31), while "this House "has no doubt power to overrule even a long established course "of decisions of the courts provided it has not itself determined "the question", yet "in general this House will adopt this "course only in plain cases where serious inconvenience or "injustice would follow from perpetuating an erroneous con- "struction or ruling of law". I quote with respect those observations to indicate how unwise it would be to cast any doubt upon decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole.

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(30) [1946] Ch. 194.

(31) [1938] A. C. 173, 194.

The appeal should in my opinion be dismissed with costs.

LORD NORMAND. My Lords, the trust is an educational trust and it therefore satisfies one of the conditions for acceptance as a charitable trust. But there is another condition which must also be satisfied, that it is a trust beneficial to the community or to a section of the community.

No general rule has yet been formulated by which to distinguish trusts which have this essential element of public benefit and those which have not, and the valiant attempts of counsel to arrive at a rule have failed to convince me. I am, however, satisfied that the element of public benefit must be found in the definition of the class of persons selected by the truster as the objects of his bounty. That seems to me to follow from the principle that the trust purpose must be directed to the benefit of the community or a section of the community. (Tudor on Charities (5th ed.), p. 11, approved by Lord Greene, M.R., in *In re Compton* (32)). The truster may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined. It is on the difficulty of defining the attribute or qualification which differentiates a section of the public from an aggregate of persons which is not a section of the public that all attempts to define the public element in charitable trusts have foundered.

I will confine myself to educational trusts. It is not obvious a priori that a trust for the education of persons having the common qualification that they have already had part of their education at a named school is public. Yet there is no doubt that such trusts are public charitable trusts and are among the most securely established trusts known to the law. On the other hand, a trust for the education of the descendants of A.B., however numerous they may be, is not a charitable trust (*In re Compton* (33), *per* Lord Greene, M.R.). These difficulties come from the historical development of the law of charity. I remind your Lordships of the observations by Lord Simonds in *Gilmour* v. *Coats* (34), that the law of charity has been built up not logically but empirically. It is this empirical development which has so often baffled efforts to reduce the law to systematized definitions.

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(32) [1945] Ch. 123, 128.
(33) Ibid. 136.
(34) [1949] A. C. 426, 443.

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In the present instance this House has for the first time to declare whether a trust for the education of the children of the employees of named employers is a charitable trust. If there had been a long and uniform trend of authority in favour of receiving such a trust as a charity, I apprehend that your Lordships would have been willing to decide the appeal in accordance with that trend. But as I shall later show, the authorities are with one exception against the acceptance of trusts of this kind as a charity.

If the issue is to be decided on principle and without reference to authority, the question is whether a class with the common attribute that the members are the children of the employees of the same employer is a section of the public or merely an aggregate of persons without public significance. The fact that the children of the employees and not the employees themselves are the beneficiaries does not help the appellants, for there is no public element in the relationship of parent and child. The common attribute that each parent has a contract of service with the same employer remains for consideration. A contract of service is in a high degree personal, and it constitutes a personal and private relationship between the parties. Whatever the number of the employees in the service of the same employer each still stands independently in this personal and private relationship to the employer. For certain purposes they are in relationship to one another, the relation of common employment with the rights and duties which arise from that relationship. These are private rights and duties and have no public element, except the interest that the community has in the harmonious and efficient operation of its industries and commerce and in the securing of good and safe conditions of labour. But that interest is not concerned with the employees of particular employers as such but with employees at large or employees generally in particular occupations and is not an element relevant to this issue.

In principle I am unable to say that any public element can be born out of the several private contracts between a particular employer and his employees. The appellant would not boldly submit that when the common employer employed two servants the public element at once emerged. He said it was a question of degree and the courts must take account of the number of employees, the magnitude of the sum settled by the truster, the size of the employers' undertaking, the non-contractual personal relationships (or their absence) between the employer and his employees, and other circumstances. I am unable to find any logical principles in these submissions. If there is no public element to be found in the bare nexus of common employment all attempts to build up the public element out of circumstances which have no necessary relation with it but are adventitious, accidental and variable must be unavailing when the truster has chosen to define the selected class solely by the attribute of common employment. I would add that the appellant's argument would lead to a degree of uncertainty in this branch of the law which only compelling authority or logical necessity would induce me to accept.

It may be conceded that the distinction inherent in the view that I have taken between an educational trust for the children of all employees in the tobacco industry (see *Hall* v. *Derby Borough Urban Sanitary Authority* (35)), and the present trust may appear to many over-refined and unpractical. But unless it is accepted that all trusts for education are charitable, that is a criticism which cannot be avoided. If a line must be drawn between public trusts and trusts that are not public there will always be marginal cases and the appearance of over-refinement.

Of the authorities, *In re Drummond* (36), a case upon the fourth of Lord Macnaghten's classes in *Income Tax Commissioners* v. *Pemsel* (37) is adverse to the appellants. *In re Rayner* (38) is the only case which supports the appellant's contention. It was assumed rather than decided by the same learned judge, Eve, J., who decided *In re Drummond* (36), that a bequest to the governors of a commercial company of shares of the company with a direction to apply the income to the education of children of persons who for five years and upwards had been in the employment of the company was a charitable trust. Both these cases were considered in *In re Compton* (39), and *In re Drummond* (36) was approved and *In re Rayner* (38) disapproved. I respectfully agree with the comments of Lord Greene, M.R., on both these cases. *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* (40), was also a case on Lord Macnaghten's fourth class. It decided that funds collected by the employees of a company for their own benefit was not a fund applicable for the benefit of the public or any section of the public, because the purpose of the subscription was to benefit the subscribers themselves. But Morton, L.J., discussed (41) the requirements that a purpose in order to be charitable must be directed to the benefit of the community or a section of the community with special relation to trusts for the benefit of employees of a particular company. With all that he said I respectfully agree.

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(35) 16 Q. B. D. 163.
(36) [1914] 2 Ch. 90.
(37) [1891] A. C. 531, 583.
(38) 89 L. J. (Ch.) 369.
(39) [1945] Ch. 123.
(40) [1946] Ch. 194.
(41) Ibid. 207–9.

I therefore consider that to admit the present trust to the category of charity would be an innovation contrary alike to principle and to the trend of authority, and on these grounds I would dismiss the appeal.

LORD OAKSEY. My Lords, I have had the advantage of reading the opinion of the noble Lord on the woolsack, and I agree with it.

✓ 1961

LORD MORTON OF HENRYTON. My Lords, I have had the privilege of reading in print the opinions which have just been delivered by my noble and learned friends Lord Simonds and Lord Normand. I agree with these opinions but, as I was a party to the decisions of the Court of Appeal in *In re Compton* (42) and *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* (43), it is perhaps appropriate that I should say a few words about those cases and certain other cases.

Counsel for the appellant submitted that the observations of Lord Greene, M.R. (with which I concurred), in the former case and of myself in the latter case, in regard to trusts for the employees of a particular company, were ill founded. I have reconsidered these observations with great care in the light of the arguments submitted on this appeal, and I see no reason to qualify any of them.

In the last portion of his speech my noble and learned friend on the woolsack referred to the " poor relations " cases, of which perhaps the most notable is *Isaac* v. *de Friez* (44). In *In re Compton* (45) Lord Greene, M.R., considered these cases and observed " The cases must at this date be regarded as good law, " although they are, perhaps, anomalous ". In the course of the argument, your Lordships' attention was called to a line of much more modern decisions which might possibly be described as the descendants of the " poor relations " cases. Recently, in the case of *Gibson* v. *South American Stores (Gath and Chaves) Ld.* (46), the Court of Appeal had to consider the trusts of a fund called " Employees' Health and Relief Fund " established by the defendant company. The board of the company had executed a deed vesting a fund in trustees and declaring (by clause 3) that it was to be used for granting, at the discretion of the board, gratuities, pensions or allowances to beneficiaries. By clause 4 it was declared that the class of beneficiaries included " all " persons who, in the opinion of the London board, are or shall " be necessitous and deserving and who for the time being are or

(42) [1945] Ch. 123.
(43) [1946] Ch. 194.
(44) 2 Amb. 595.
(45) [1945] Ch. 123, 139.
(46) [1950] Ch. 177.

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Lord Morton of Henryton.

"have been in the company's employ or in the employ of any "agents of the company or in the employ of [a subsidiary "company] and the wives, widows, husbands, widowers, children, parents and other dependants of any person who for the "time being is or would, if living, have been himself or herself "a member of the class of beneficiaries".

The Court of Appeal first held that, as a matter of construction, the trusts established in clauses 3 and 4 were limited to necessitous beneficiaries. Sir Raymond Evershed, M.R., having stated the above decision, continued (47): "That left as the next "point for discussion what, it appeared, might well be a question "of law of great difficulty and of no little importance. The "question may, I think, be put thus: under the law as it has "now been established, and in the light of several recent "decisions, both in this court and in the House of Lords, is a "trust for a class of poor persons defined by reference to the fact "that they are employed by some person, firm or company, a "good charitable trust, or does it fail of that qualification through "the absence of the necessary public element?". If one omits the word "poor" the question thus posed is, in substance, the same as the question which arises on the present appeal. The learned Master of the Rolls then went on to consider the cases of *Spiller* v. *Maude* (48), *In re Gosling* (49), *In re Buck* (50), and *In re Sir Robert Laidlaw* (51), an unreported case decided by the Court of Appeal in 1935, and felt constrained by the last mentioned authority to decide that the trust in *Gibson's* case (52) was a valid charitable trust, notwithstanding the limited nature of the class of beneficiaries.

The element of poverty of the beneficiaries was present in each of the cases considered by the learned Master of the Rolls, and therefore each case fell into the first of the four classes of charitable trusts laid down by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (53), whereas the present case falls into the second class. I think that for this reason your Lordships are of opinion that it is neither necessary nor desirable to express any view, on the present occasion, on the cases to which I have just referred. I am content to fall in with this opinion, only observing that they may require careful consideration in this House on some future occasion.

I agree that the appeal must be dismissed with costs.

LORD MACDERMOTT. My Lords, it is not disputed that this trust is for the advancement of education. The question is whether it is of a public nature, whether, in the words of Lord Wrenbury in *Verge* v. *Somerville* (54), "it is for the benefit "of the community or of an appreciably important class of the "community". The relevant class here is that from which those to be educated are to be selected. The appellant contends that this class is public in character; the respondent bank (as personal representative of the last surviving settlor) denies this and says that the class is no more than a group of private individuals.

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(47) [1950] Ch. 177, 191.
(48) (1881) 32 Ch. D. 158.
(49) (1900) 48 W. R. 300.
(50) [1896] 2 Ch. 727.
(51) (1935) Unrep.
(52) [1950] Ch. 177.
(53) [1891] A. C. 531, 583.

Thought test
should be general +
impersonal = fair
not test in Re Compton.

Until comparatively recently the usual way of approaching an issue of this sort, at any rate where educational trusts were concerned, was, I believe, to regard the facts of each case and to treat the matter very much as one of degree. No definition of what constituted a sufficient section of the public for the purpose was applied, for none existed; and the process seems to have been one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single, conclusive test. The investigation left the course of the dividing line between what was and what was not a section of the community unexplored, and was concluded when it had gone far enough to establish to the satisfaction of the court whether or not the trust was public; and the decision as to that was, I think, very often reached by determining whether or not the trust was private.

If it is still permissible to conduct the present inquiry on these broad if imprecise lines, I would hold with the appellant. The numerical strength of the class is considerable on any showing. The employees concerned number over 110,000, and it may reasonably be assumed that the children, who constitute the class in question, are no fewer. The large size of the class is not, of course, decisive but in my view it cannot be left out of account when the problem is approached in this way. Then it must be observed that the propositi are not limited to those presently employed. They include former employees (not reckoned in the figure I have given) and are, therefore, a more stable category than would otherwise be the case. And, further, the employees concerned are not limited to those in the service of the "British American Tobacco Co., Ld. or any of its sub-"sidiary or allied companies"—itself a description of great width—but include the employees, in the event of the British American Tobacco Co., Ld. being reconstructed or merged on amalgamation, of the reconstructed or amalgamated company or any of its subsidiary companies. No doubt the settlors here had a special interest in the welfare of the class they described, but, apart from the fact that this may serve to explain the

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(54) [1924] A. C. 496, 499.

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particular form of their bounty, I do not think it material to the question in hand. What is material, as I regard the matter, is that they have chosen to benefit a class which is, in fact, substantial in point of size and importance and have done so in a manner which, to my mind, manifests an intention to advance the interests of the class described as a class rather than as a collection or succession of particular individuals.

Proceeding on the basis I have mentioned, I find no difficulty in distinguishing this trust from that considered by Eve, J., in *In re Drummond* (55). There the class was narrowly defined by reference to the workpeople employed in a particular department in a particular business. I do not question the correctness of the decision that that was a trust for private individuals and therefore not public in the relevant sense. But I do not think there is anything in the judgment of the learned judge to warrant the view that the conclusion he reached should prevail in all cases where, in the qualifications for admission to the class of beneficiaries, there has somewhere to be found, it may be at one remove or more, the fact of employment by one of a number of designated employers. There is another difference to be noted between that case and the present one. Apart from the marked contrast in the scope of the respective trusts, the trust purpose in *In re Drummond* (56) was not, prima facie, within any of the well-known classes of legal charity. Here it is otherwise, for the trust is plainly one for the advancement of education. Had Eve, J., been able to hold in *In re Drummond* (56) that the trust was for the relief of poverty, I think it is clear from his subsequent decision in *In re Rayner* (57) that he would have reached a different conclusion. It may be that in this respect the relief of poverty and the advancement of education do not stand on precisely the same footing. I confess I do not see why in principle there should be such a distinction; but even if there is, it is none the less true to say that in both fields the actual work of the trust advances the public interest in some degree. If, then, the class of potential beneficiaries in an educational trust is substantial, and not obviously private in nature, I think one may reasonably commence, in the kind of investigation I am considering, by assuming, until the contrary appears, that the trust is for the benefit of the community.

The respondent bank, however, contends that the inquiry should be of quite a different character to that which I have been discussing. It advances as the sole criterion a narrower test derived from the decisions of the Court of Appeal in *In re Compton* (58), and in *In re Hobourn Aero Components Ld.'s Air*

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(55) [1914] 2 Ch. 90.

(56) [1914] 2 Ch. 90.

(57) 89 L. J. (Ch.) 369.

(58) [1945] Ch. 123.

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Raid Distress Fund (59). The basis and nature of this test appear from the passage in the judgment of the court in *In re Compton* (60), where Lord Greene, M.R., says: "In the case "of many charitable gifts it is possible to identify the individuals "who are to benefit, or who at any given moment constitute "the class from which the beneficiaries are to be selected. This "circumstance does not, however, deprive the gift of its public "character. Thus, if there is a gift to relieve the poor inhabitants "of a parish the class to benefit is readily ascertainable. But "they do not enjoy the benefit, when they receive it, by virtue "of their character as individuals but by virtue of their membership of the specified class. In such a case the common quality "which unites the potential beneficiaries into a class is essentially "an impersonal one. It is definable by reference to what each "has in common with the others, and that is something into "which their status as individuals does not enter. Persons "claiming to belong to the class do so not because they are A.B., "C.D. and E.F., but because they are poor inhabitants of the "parish. If, in asserting their claim, it were necessary for them "to establish the fact that they were the individuals A.B., C.D. "and E.F., I cannot help thinking that on principle the gift "ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element "would deprive the gift of its necessary public character. It "seems to me that the same principle ought to apply when the "claimants, in order to establish their status, have to assert "and prove, not that they themselves are A.B., C.D. and E.F., "but that they stand in some specified relationship to the "individuals A.B., C.D. and E.F., such as that of children or "employees. In that case, too, a purely personal element enters "into and is an essential part of the qualification, which is "defined by reference to something, i.e., personal relationship "to individuals or an individual which is in its essence non-"public".

The test thus propounded focuses upon the common quality which unites those within the class concerned and asks whether that quality is essentially impersonal or essentially personal. If the former, the class will rank as a section of the public and the trust will have the element common to and necessary for all legal charities; but, if the latter, the trust will be private and not charitable. It is suggested in the passage just quoted, and made clear beyond doubt in *In re Hobourn* (61), that in the opinion of the Court of Appeal employment by a designated employer must be regarded for this purpose as a personal and not as an impersonal bond of union. In this connexion and as illustrating the discriminating character of what I may call "the "*Compton* (62) test" reference should be made to that part of the judgment of the learned Master of the Rolls in *In re Hobourn* (63) in which he speaks of the decision in *Hall* v. *Derby Borough Urban Sanitary Authority* (64). The passage runs thus: "That related to a trust for railway servants. It is said that if "a trust for railway servants can be a good charity, so too a trust "for railway servants in the employment of a particular railway "company is a good charity. That is not so. The reason, I "think, is that in the one case the trust is for railway servants in "general and in the other case it is for employees of a particular "company, a fact which limits the potential beneficiaries to a "class ascertained on a purely personal basis".

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(59) [1946] Ch. 194.
(60) [1945] Ch. 123, 129–30.
(61) [1946] Ch. 194.

My Lords, I do not quarrel with the result arrived at in the *Compton* (65) and *Hobourn* (66) cases, and I do not doubt that the *Compton* test may often prove of value and lead to a correct determination. But, with the great respect due to those who have formulated this test, I find myself unable to regard it as a criterion of general applicability and conclusiveness. In the first place I see much difficulty in dividing the qualities or attributes, which may serve to bind human beings into classes, into two mutually exclusive groups, the one involving individual status and purely personal, the other disregarding such status and quite impersonal. As a task this seems to me no less baffling and elusive than the problem to which it is directed, namely, the determination of what is and what is not a section of the public for the purposes of this branch of the law. After all, what is more personal than poverty or blindness or ignorance? Yet none would deny that a gift for the education of the children of the poor or blind was charitable; and I doubt if there is any less certainty about the charitable nature of a gift for, say, the education of children who satisfy a specified examining body that they need and would benefit by a course of special instruction designed to remedy their educational defects.

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test? [illegible]

But can any really fundamental distinction, as respects the personal or impersonal nature of the common link, be drawn between those employed, for example, by a particular university and those whom the same university has put in a certain category as the result of individual examination and assessment? Again, if the bond between those employed by a particular railway is purely personal, why should the bond between those who are employed as railway men be so essentially different? Is a distinction to be drawn in this respect between those who are employed in a particular industry before it is nationalized and those who are employed therein after that process has been completed and one employer has taken the place of many? Are miners in the service of the National Coal Board now in one category and miners at a particular pit or of a particular district in another? Is the relationship between those in the service of the Crown to be distinguished from that obtaining between those in the service of some other employer? Or, if not, are the children of, say, soldiers or civil servants to be regarded as not constituting a sufficient section of the public to make a trust for their education charitable?

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(62) [1945] Ch. 123.
(63) [1946] Ch. 194. 206.
(64) 16 Q. B. D. 163.
(65) [1945] Ch. 123.
(66) [1946] Ch. 194.

It was conceded in the course of the argument that, had the present trust been framed so as to provide for the education of the children of those engaged in the tobacco industry in a named county or town, it would have been a good charitable disposition, and that even though the class to be benefited would have been appreciably smaller and no more important than is the class here. That concession follows from what the Court of Appeal has said. But if it is sound and a personal or impersonal relationship remains the universal criterion I think it shows, no less than the queries I have just raised in indicating some of the difficulties of the problem, that the *Compton* (67) test is a very arbitrary and artificial rule. This leads me to the second difficulty that I have regarding it. If I understand it aright it necessarily makes the quantum of public benefit a consideration of little moment; the size of the class becomes immaterial and the need of its members and the public advantage of having that need met appear alike to be irrelevant. To my mind these are considerations of some account in the sphere of educational trusts for, as already indicated, I think the educational value and scope of the work actually to be done must have a bearing on the question of public benefit.

Finally, it seems to me that, far from settling the state of the law on this particular subject, the *Compton* (67) test is more likely to create confusion and doubt in the case of many trusts and institutions of a character whose legal standing as charities has never been in question. I have particularly in mind gifts for the education of certain special classes such, for example, as the daughters of missionaries, the children of those professing a particular faith or accepted as ministers of a particular denomination, or those whose parents have sent them to a particular school for the earlier stages of their training. I cannot but think that in cases of this sort an analysis of the common quality binding the class to be benefited may reveal a relationship no less personal than that existing between an employer and those in his service. Take, for instance, a trust for the provision of university education for boys coming from a particular school. The common quality binding the members of that class seems to reside in the fact that their parents or guardians all contracted for their schooling with the same establishment or body. That the school in such a case may itself be a charitable foundation seems altogether beside the point and quite insufficient to hold the *Compton* test at bay if it is well founded in law.

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(67) [1945] Ch. 123.

My Lords, counsel for the appellant and for the Attorney-General adumbrated several other tests for establishing the presence or absence of the necessary public element. I have given these my careful consideration and I do not find them any more sound or satisfactory than the *Compton* (67) test. I therefore return to what I think was the process followed before the decision in *Compton's* case (67), and, for the reasons already given, I would hold the present trust charitable and allow the appeal. I have only to add that I recognize the imperfections and uncertainties of that process. They are as evident as the difficulties of finding something better. But I venture to doubt if it is in the power of the courts to resolve those difficulties satisfactorily as matters stand. It is a long cry to the age of Elizabeth and I think what is needed is a fresh start from a new statute.

Appeal dismissed.

Solicitors: *D. M. Oppenheim; Treasury Solicitor; Hugh-Jones & Flinn.*

(67) [1945] Ch. 123.

J. C.*
1951
Feb. 19.

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA . . . . . APPELLANTS;

AND

SHERWIN-WILLIAMS COMPANY OF CANADA LD. . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Insurance—"Accident" policy—Exception of "fire"—Bleacher tank—Tank door blown off by internal pressure—Escape of gas—Explosion—Unexplained source of ignition—Explosion damage due to "accident" and not to "fire".

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* *Present:* LORD PORTER, LORD MERRIMAN, LORD REID, LORD RADCLIFFE and LORD TUCKER.

J. C.
1951

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA
v.
SHERWIN-WILLIAMS COMPANY OF CANADA LD.

Canada—Practice and procedure—Assignment of right of action—Continued right to sue—"Interest" therein—"Signification"—Code of Civil Procedure, art. 77—Civil Code, s. 1571.

The appellant insurance company undertook in the event of an accident to the respondents' "steam-jacketed bleacher tank" to pay "to the assured for loss on the property of the assured directly "damaged by such accident . . . excluding (*a*) loss from fire . . . "(*e*) loss from any indirect result of an accident". "Accident" was defined in the policy as "a sudden and accidental tearing "asunder of the object or any part thereof caused by pressure of "steam, air, gas, . . .".

While the tank was being used for the purpose of bleaching turpentine, internal pressure blew off the tank door and permitted a large body of gas to escape. The gas, when united in a certain concentration with air, became a highly explosive mixture, and, almost immediately after the tank door had been blow off, it became ignited in some unexplained way and exploded, shattering a large portion of the building. The greater part of the damage caused by the disaster was attributable to a fire which followed the explosion, and was admittedly excluded under the policy. On a claim by the respondents for the amount attributable to causes other than fire it was pleaded by the appellants, inter alia, that the loss was not caused by an accident, but was due to fire—the unexplained source of ignition—and was expressly excepted by the terms of the policy. It was also said that the accident was not the direct cause of the loss, and that its only direct effect was to tear the tank asunder.

In fact the companies which had insured the respondents against fire, and had paid the loss before the initiation of this action, had also, after action brought, paid to the respondents the amount of the loss which they now claimed against the appellants, the fire companies taking from the respondents documents acknowledging the receipt of the amount of their claim against the appellants and assigning their rights, title and interest therein to the fire companies. Those documents were not served on the appellants and were only disclosed during the trial of the action. In those circumstances the appellants had further pleaded that, as the respondents had already received from the fire companies the total amount to which they were entitled, they had no claim against the appellants.

Held, first, that the respondents were not precluded from suing owing to the fact that they had received payment from the fire companies. By the terms of the transfer to the fire companies, respondents were under an obligation to continue the action or allow it to be continued in their name. It was still *their* action, and they had an interest therein within the meaning of art. 77 of the Code of Civil Procedure, which provides that "No person can "bring an action at law unless he has an interest therein . . .".

Further, proof of payment by the fire companies and of the transfer of the debt from the seller to the buyer was not a sufficient signification of the act of sale within the meaning of s. 1571 of the Civil Code, which provides that "the buyer has no possession "available against third persons until signification of the act of sale "has been made . . . ". Signification implies an act on the part of the buyer or seller, as opposed to acceptance of the transfer by the debtor, whereby the buyer is enabled to sue him. Here there was no act by buyer or seller and therefore no signification by either.

Bank of Toronto v. *St. Lawrence Fire Insurance Co.* [1903] A. C. 59 distinguished.

Held, secondly, that the risk covered was something more than the mere tearing asunder of the tank, and that the explosion which followed was the direct result of the accident to the tank. "Direct" in qualifying "result" did not imply that there could be no step between the cause and the consequence: *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* [1918] A. C. 350, 362–363; *Canada Rice Mills Ld.* v. *Union Marine and General Insurance Co.* [1941] A. C. 55, 71, applied. There was here on the facts no appreciable moment of time between the beginning of the ignition and the explosion. Each was a part of the same event, the ignition being the first and the explosion the final stage of the disaster. There was no separate fire which burnt in the room before the explosion took place—the fire in the explosive mixture being merely an incident in the explosion. The fact that ignition, and in that sense fire, was an element in the ultimate result, was not destructive of the respondent's claim. Such a source of ignition was not included within the exception.

As pointed out in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (supra), the cause of an event has to be decided on common-sense principles, and to be ascertained by determining what is in substance the cause. In this case the cause of the explosion was the bursting open of the tank door, and it would be an unjustifiable view to hold that one of the sources of ignition always present in a factory was in substance the cause of the explosion. The appellants were not absolved from liability for the damage due to the explosion by reason of the exception of fire.

Tannenbaum v. *Connecticut Fire Insurance Co.* (1937) 193 Atlantic Rptr. 305, at p. 308; *Stanley* v. *Western Insurance Co.* (1868) L. R. 3 Ex. 71, at p. 75; *Hobbs* v. *Guardian Fire and Life Assurance Co.* (1886) 12 S. C. R. (Can.) 631; and *Curtis's and Harvey (Canada) Ld.* v. *North British and Mercantile Insurance Co.* [1921] 1 A. C. 303, at p. 309 considered.

Judgment of the Supreme Court of Canada [1950] S. C. R. (Can.) 187 affirmed.

APPEAL (No. 12 of 1950), by special leave, from a judgment of the Supreme Court of Canada (December 23, 1949), which reversed a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) (January 12, 1949), which in turn had reversed a judgment of the Superior Court, District of Montreal (March 29, 1946).

The following facts are taken from the judgment of the Judicial Committee: The claim in the action out of which this appeal arose was made under the terms of an insurance policy issued by the appellants in favour of the respondents on March 9, 1940, covering a period from March 15, 1940, to March 15, 1943. The risks insured against were "loss (. . . including loss of the "kind described in s. 4) from an accident as here defined . . . "to an object described herein", and the policy included the following provisions: "Section 1. To pay the assured for loss "on the property of the assured directly damaged by such "accident, . . . excluding (*a*) loss from fire (or from the use of "water or other means to extinguish fire); (*b*) loss from an "accident caused by fire; . . . (*e*) loss from any indirect result of "an accident". Section 4 provided that the insurers were to pay "such amounts as the assured should become obligated to "pay by reason of the liability of the assured, including liability "for loss of services on account of bodily injuries (including death "at any time resulting therefrom) sustained by any person and "caused by such accident except that the indemnity hereunder "shall in no event apply to any liability or obligation under any "workmen's compensation law".

The opening paragraph of the policy referred to an accident "as herein defined" and the definition read as follows: "C. As "respect any object described in this schedule, 'Accident' shall "mean a sudden and accidental tearing asunder of the object or "any part thereof caused by pressure of steam, air, gas, water "or other liquid, therein, or the sudden or accidental crushing "inward of the object or any part thereof caused by vacuum "therein; and shall also mean a sudden and accidental cracking "of any cast iron part of the object, if such cracking permits "the leakage of said steam, air, gas, water or other liquid, but "leakage at valves, fittings, joints or connections shall not con-"stitute an accident".

The objects covered by the insurance were enumerated in the annexes to the policy, and those with which this action was concerned were described as three tanks designated as Nos. 1, 2 and 3. The disaster which gave rise to the action originated in the tank No. 1, which was described as a "steam-jacketed "bleacher tank". That tank consisted of a large metal cylinder, resting in a horizontal position on a kind of cradle which was bolted to the floor. The lower half of the tank was surrounded by a steam chamber or jacket. That chamber was fixed on to the tank in such a way that the outside wall of the cylinder constituted the inside wall of the chamber. The cylinder and chamber were entirely surrounded (except for certain openings) by an asbestos covering.

The tank was situated on the third floor of the respondent company's linseed oil mill, which was located on St. Patrick

Street in the City of Montreal. The third storey was divided into two large rooms by a wall in which there were two doors, eight feet square. Those doors were referred to as the north door and the south door, and the rooms were designated as the east room and the west room. The height of the ceiling was given as about 17 feet. The tank and other equipment were in the east room; in the west room were four filter presses. The only regular stairway from the latter was reached through the east room, where the elevator shaft was also to be found, but an outside fire-escape, consisting of a metal stairway, ran down from a doorway near the south-west corner of the west room itself.

The tank was used normally for bleaching linseed oil, for which purpose crude oil was syphoned into the cylindrical chamber of the tank and to it was added a quantity of " filtercel " and a further quantity of bleaching earth known as " filtrol ". Both the liquid and the powders were put into the cylinder of the tank by means of a vacuum system. Inside the cylinder there was a kind of shaft, connected to a motor which was situated outside and close to the rear of the tank. That shaft revolved rapidly, thus keeping the contents of the cylinder in suspension. After the liquid and powders had entered the cylinder, steam was turned on to fill the steam chamber. When the required temperature was obtained the steam was turned off, and the shaft was allowed to continue to operate for about half an hour. The contents of the cylinder were then allowed to run down through a pipe into the basement, where a pump was situated. That pump served to force the liquid up again to one of the filter presses in the west room where it passed through the press, was there strained through cloths, and came out bleached.

Until Sunday, August 2, 1942, the normal use of the tank and the other apparatus described above had been for bleaching linseed oil. It had never previously been used for bleaching turpentine, but it was determined to bleach a quantity of turpentine by the same process on that date. For bleaching linseed oil, however, the temperature in the tank was customarily raised to about 190° Fahrenheit, whereas the instructions issued for the bleaching of the turpentine specified 165° Fahrenheit as the figure to be reached.

The tank in question was primarily constructed to resist pressure from without following on the evacuation of air from it in order that the material to be mixed might be sucked into the boiler. Consequently the door which it contained (which was intended to be used for cleaning purposes only) opened outwards and became more firmly held in position the greater the pressure from without, and it was strongly constructed, was held in position by an iron bar, and would also resist considerable pressure from within. In the door, which was at the front of the tank, there was an aperture, referred to as a peep hole, covered with glass and even more strongly resistant to pressure than the door itself. At the back, opposite that peep hole, was another glass aperture of similar construction. There was also a vent, which was open at all material times, leading from the tank to the air in the east room.

On the morning in question the process described above was followed until the first batch of the mixture had been pumped up to the filters in the west room. There a number of employees, including the foreman, were gathered round a filter press to see how effective the bleaching had been. They found it unsatisfactory and sent one of their number down to stop the pumps to the filter press. Unknown to any of those engaged in the process, the mixing of filtrol with turpentine produced an exceedingly heavy pressure of vapour within the tank and created a gas which, when united in a certain concentration with air, became a highly explosive mixture. The result was that that vapour forced itself out through the open vent, then, as the pressure mounted, first distorted the door and, a second or two later, blew it off and permitted a large body of gas to escape. The vapours so escaping penetrated the east room and, mixing with the air there, eventually became ignited in some way, exploded and shattered a large portion of the building.

The men who were at work and gathered round the filter press in the west room first knew of anything unusual because they heard what they described as a sizzling noise which, it was common ground, was the escape of the gas from the distorted door. Two of them turned and took a step or two towards the two doors between the east and west rooms where they saw a cloud of vapour, followed, as some at any rate observed, by a flash or flame which may have been at both doors or only at one. [In their Lordships' view it was immaterial which account was accurate.] Thereupon the foreman called to them to escape by the fire escape and a rush was made towards it. By the time those in front had reached that staircase, but before those behind had got so far, a boom was heard which both sides accepted as the blowing off of the door of the tank. Almost immediately afterwards, and when the last men had just reached the top of the fire escape, the heavy explosion took place which wrecked the building. The only man in the east room was killed. All those in the west room managed to escape.

The damage caused by the disaster amounted to $159,724.62. Of that amount, however, the greater part was attributable to a fire which followed the explosion, or to damage from water made use of to put out the fire, and was accepted by the respondents as excluded from the claim against the appellants because of the wording of s. 1 of the policy. The amount attributed to causes other than fire damage and said to be covered by the policy was, after adjustment, $45,791.38, and that sum was claimed in the present action. The amount of the claim was not in dispute, but liability was denied on a number of grounds.

It was said that the loss was not caused by an accident as defined in the policy but by the subsequent explosion: that, in any case, it was due to fire which, so far from being covered, was expressly exempted by the terms of the policy. Moreover, it was contended that the accident was not the direct cause of the loss; its only direct effect was to tear the tank asunder.

Two additional defences were raised. (1.) It was said that the respondents had already received from the companies insuring against fire the total amount to which they were entitled and therefore had no claim against the appellants, and (2.) that there was concurrent insurance and the loss should therefore be divided in a prescribed proportion between those companies which were on the risk.

The Superior Court, District of Montreal (Tyndale, J.) condemned the appellants to pay to the respondents $45,791.38, with interest from the date of judgment, and costs. That judgment was reversed by the Court of King's Bench for the Province of Quebec (Appeal Side) (Barclay, Marchand, Bissonette and Casey, JJ., Letourneau, C.J., dissenting). On further appeal the judgment of the Court of King's Bench was reversed by the Supreme Court of Canada (Rinfret, C.J., Taschereau, Estey and Locke, JJ., Rand, J., dissenting).

1950. Oct. 19, 23, 24, 25, 26, 30, 31; Nov. 1, 2, 6, 7, 8, 9. *John T. Hackett, K.C.* (Canadian Bar) and *Gahan* for the appellant company. The amount of the loss is not questioned, only the liability. In the first place the appellants pleaded a civil law point, namely, that the loss was a fire loss; that the respondents had valid fire insurance indemnifying them against that loss; and that that loss has been paid in full by the fire companies and the respondents have therefore no claim against the appellants.

The first main defence is that the loss suffered by the respondents does not come within the terms of the risk. Secondly, if it does come within the general terms, it is excluded by the exceptions (*a*) and (*e*) of s. 1 of the policy—" loss from " fire ", and " loss from any indirect result of an accident ". The evidence showed that there was a fire burning briskly and brightly in the room before the tank door was blown off. The first explosion was something which resulted from pressure within the tank and was in no way associated with what is called a combustion explosion. This policy should be approached with one's mind washed clean of all interpretations of general terms, which have been moulded almost into rules, in regard to causation, and particularly in marine matters. These time-honoured rules have no place here. The doctrine of causa proxima has grown up around loose and incomplete language. The clause now in question appears never to have been before a court for judicial interpretation: it contains very complete statements; there is an accident, an object, and the word " directly ", which, it is submitted, bears on the agency, the instrument, which brought about the disaster. " Directly " in the text should be given its full meaning, and should not be restricted or curtailed as appears to have been done in such cases as *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1)—which was made the basis of the judgment of the Supreme Court in the present case—where it was limited to cause. Here the word should be given its full latitude, and it means not only cause, it means the elimination of time, of space and of intervening objects. " Damage " as defined does not extend to damage done by parts of the tank in their flight; and " accident " as defined in the circumstances outlined here limits the liability to the damage that was wrought by the sudden accidental tearing asunder of the object by pressure of steam, gas, etc., therein. The policy covers only loss on the property of the respondents directly damaged by an accident as defined, and the loss on which the claim is based is not such a loss.

Turning to the exceptions, which are only needed as a precautionary matter, the first is " loss from fire ". The expert witnesses have said that this type of explosion cannot occur without ignition—without a fire. Loss from fire means a loss in which fire unqualified, unrestricted in any way, plays a part. It is submitted that there was a fire in the east room before the accident—a fire living its own life distinct and apart from the explosion. The existence and integrity of the fire, whatever may follow, is complete, and the insurer is entitled to the exclusion, even though later the fire became provocative and resulted in an explosion. The fact that the explosion could not have happened without fire is a sufficient answer. Where fire is essential to this type of explosion the exclusion of fire gives immunity.

[Reference was made to the following authorities: *Sin Mac Lines Ld.* v. *Hartford Fire Insurance Co.* (2); *Hobbs* v. *Guardian Assurance Co.* (3); *Curtis's and Harvey* (*Canada*) *Ld.* v. *North British and Mercantile Insurance Co.* (4); *W. Malcolm Mackay*

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(1) [1918] A. C. 350.

(2) [1936] S. C. R. (Can.) 598, 600.

(3) (1886) 12 S. C. R. (Can.) 631, 642.

(4) [1921] 1 A. C. 303, 307 et seq.

Co. v. *British America Assurance Co.* (5); *Palatine Insurance Co.* v. *Gregory* (6); *Riedle Brewery* v. *Merchants Fire Assurance* (7); and *Stanley* v. *Western Insurance Co.* (8).] With regard to the the second exception—loss from any indirect result of an accident—the loss claimed was from an indirect result of the accident to the tank if it is within the risk at all. [On this point, in addition to citations from the above authorities, reference was made to *In re Hooley Hill Rubber and Chemical Co. and Royal Assurance Co.* (9).] If the appellants insured the respondents against the loss which is the subject of this claim, there were concurrent insurances in respect of such loss and the appellants are liable only for their proportion.

J. Arthur Mathewson, K.C. (Canadian Bar) and *Megaw* for the respondents. The substance of the case is the question of the facts and the inference to be drawn from them. There is no serious conflict on the facts. The vapour gas formed a source of ignition, but there was no indication what was the point of ignition. A reasonable deduction is that it was the hot door of the tank. The appellants must prove fire to escape liability under the policy. First, there was no fire in the common-sense meaning of the word; it was not the evil genius that caused the disaster; the proximate cause emanated from the boiler. In the *Leyland* case (10) and in subsequent cases there was a competition between two causes, and the solution was in finding the dominant cause. It was said in *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* (11) that " each case must be judged " in the light of its own facts and by resorting, not to the refine- " ments of the philosophical doctrine of causation, but to the " commonplace tests which the ordinary business man conversant " with such matters would adopt ", and again, " once it is clear " . . . that ' proximate ' here means, not latest in time, but " predominant in efficiency, there is necessarily involved a process " of selection from among the co-operating causes to find what is " the proximate cause in the particular case ".

The damages which the respondents are claiming are one hundred per cent. explosion damage which preceded any fire in the ordinary sense. The exception of fire in the policy applies to all the loss that flows from fire which came subsequent to the explosion. If a spark which causes an explosion is held by the Board to be " fire " within the meaning of a commercial policy, and to be the dominant cause, then the respondents must fail.

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(5) [1923] S. C. R. (Can) 335, 344.
(6) [1926] A. C. 91, 94.
(7) (1926) 36 Man. L. R. 181, 186.
(8) (1868) L. R. 3 Ex. 71, 75.
(9) [1920] 1 K. B. 257, 261 et seq.
(10) [1918] A. C. 350.
(11) [1942] A. C. 691, 702, 706.

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The appellants did not exclude an explosion in the ordinary sense which preceded a fire in the ordinary sense. To bring it under their exception it is for the appellants so to interpret the facts as to make it appear that this explosion was an incident of the fire—that it followed the fire, which has to be the dominant cause. Such cases as *In re Hooley Hill Rubber and Chemical Co.* (12) and *Stanley* v. *Western Insurance Co.* (13) all make a distinction between explosion and fire. If it is desired to exclude explosion it must be done expressly, and the appellants have not done so here. The facts show that the explosion preceded the fire and was the direct result of the bursting of the tank. The causa causans was unquestionably the accident to the tank: the things that brought about the disaster were (a) the rupture of the tank, and (b) the going out of the vapours and their inevitable explosion; and that is a chain of events which is unbroken; it flows right from the original accident, the rupture, straight through to the falling of the walls. There was no other contributing cause which did anything to bring about that result. There was no proof of what the man in the street would for a minute accept as fire. Proof of fire in that first source of ignition is completely absent. *Hobbs'* case (14) has nothing to do with this case.

In *Mitchell* v. *Potomac Insurance Co.* (15), where the point now in question was weighed, the initial stages in the explosion were not fire within the meaning of the policy. The *Sin Mac Lines* case (16) is parallel with the last-cited American case. It was stated in *Tannenbaum* v. *Connecticut Fire Insurance Co.* (17) that "the flash of the explosion was not itself a preceding "hostile fire". There appears to be no case on whether a combustion explosion is fire other than those two American cases. So the authorities seem to show that the original flash in the present case was not "fire" either in the common-sense or the legal view. [Reference was also made to *Curtis's and Harvey (Canada) Ld.* v. *North British and Mercantile Insurance Co.* (18); *Clan Line Steamers Ld.* v. *Board of Trade* (19); *Everett* v. *London Assurance* (20); *In re Etherington and the Lancashire and Yorkshire Accident Insurance Co.* (21), and Halsbury's Laws of England (2nd ed.), Vol. 18, p. 306, para. 430.]

The question of causation is one of fact to be judged in the light of the circumstances. On the facts the proximate cause was the accident. It cannot be said here that "fire" was the dominant

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(12) [1920] 1 K. B. 257.
(13) L. R. 3 Ex. 71.
(14) 12 S. C. R. (Can.) 631.
(15) (1901) 183 U. S. 42.
(16) 1936 S. C. R. (Can.) 598.
(17) (1937) 193 Atlantic Rptr. 305, 308.
(18) [1921] 1 A. C. 303, 309–10.
(19) [1929] A. C. 514, 524.
(20) (1865) 19 C. B. (N. S.) 126.
(21) [1909] 1 K. B. 591, 596.

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cause, and the appellants have not discharged the onus on them to bring themselves within the four corners of the exception. The appellants' allegation that they did not cover the respondents for anything beyond the rupture of the tank itself is untenable, as also is their defence that this damage was caused indirectly—that there was a new agency intervening, an explosion. It is still direct if the rupture of the tank was the dominant or the proximate cause of the explosion which in turn pushed out the walls. Even assuming, contrary to the respondents' submission, that there was a fire, nevertheless the direct rupture of the tank was the dominant cause, the fire's contribution being minor and incidental and not in any way dominant.

Megaw following. With regard to the meaning of " fire ", this policy contains a reference to explosion in the schedule, and the word " accident " includes explosion by gas, which is necessarily a combustion explosion. So the policy itself expressly says that accident included a combustion explosion. [Reference was made to *Abasand Oils Ld.* v. *Boiler Inspection and Insurance Co. of Canada* (22).] On the question of the dominant cause, it is submitted that *Stanley's* case (23) and the *Hooley Hill* case (24) were not inconsistent with the dictum of Lord Dunedin in *Leyland's* case (25). [Reference was also made to *Etherington's* case (21) and to *Coxe* v. *Employers' Liability Assurance Corporation Ld.* (26).]

Gahan in reply. The schedule gives no assistance in determining the matters which arise for consideration in this case. It is common ground from all the witnesses that there was no fire within the tank; it was external fire. The evidence is only consistent with the existence of a fire in the escaped gases before the explosion which shattered the building occurred. The evidence establishes that before the bursting of the door—the tearing asunder—a fire was in existence: the bursting of the door could not be a proximate cause of anything that happened before that event. [Reference was made to *Austin* v. *Drew* (27).]

John T. Hackett, K.C. With regard to the civil law point, the respondents, having been paid by the fire insurance companies the full amount of their loss, including the amount claimed from the appellants, had not sufficient interest in the claim to bring an action against the appellants by reason of art. 77 of the Code of Civil Procedure, which provides that: " no person can bring an " action at law unless he has an interest therein . . .". And the fire insurance companies could not use the name of another to enforce any rights which they might have against the

(22) [1949] W. N. 428.
(23) L. R. 3 Ex. 71.
(24) [1920] 1 K. B. 257.
(25) [1918] A. C. 350, 363.
(26) [1916] 2 K. B. 629.
(27) (1815) 4 Camp. 360.

appellants by reason of art. 81 of that Code, which enacts that: "a person cannot use the name of another to plead, except the "Crown through its recognized officers". It was held in the Supreme Court, wrongly, it is submitted, that the fire insurance companies were "assignees of a debt which they have bought "from the respondents", and that, within the meaning of s. 1570 of the Civil Code, "between the respondents and the fire "insurance companies the sale was perfected at the date the "relevant document [assigning the respondents' rights in the "action to the fire companies] was signed", but that there was no signification of the act of sale within the meaning of s. 1571 of the Civil Code so as to give the fire insurance companies possession available against the appellants, and the title remained in the assignors, the respondents. It is submitted that there having been alleged and proved as an issue in the case the transfer of the respondents' rights to the fire insurance companies and the payment by those companies to the respondents, a sufficient signification of the act of sale within the meaning of s. 1571 of the Civil Code has been made, and the title no longer remains in the respondents: *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.* (28).

J. Arthur Mathewson, K.C. This point has been decided against the appellants in all the courts below, and for the reasons stated therein the respondents had an interest in instituting and in continuing the action against the appellants, and have not lost their right to do so. The proof that there was no signification is contained in the evidence.

1951. Feb. 19. The judgment of their lordships was delivered by Lord Porter, who stated the facts set out above, and continued:—The question whether the respondents' claim is no longer maintainable on the ground that they have already been paid in full goes to the root of the matter, since it challenges their right to recover at all. It is therefore best dealt with first, as it was dealt with by the courts in Canada. In all three courts there it has been uniformly unsuccessful, even with those judges who for other reasons would have dismissed the claim. Their Lordships agree that the contention is not sustainable. They need not repeat what has already been pointed out in those courts, that there is here no question of subrogation but merely of the transfer of a debt. The facts are not in dispute, but stand thus. Before the initiation of the action the twenty-two fire companies, parties to the risk, paid each the proportion of $100,000, being part of the loss. Later on one Jenkins, a fire insurance broker and agent of the assured, persuaded the fire companies to pay

(28) [1903] A. C. 59.

the residue of the loss, leaving it, as he said, to the two groups of insurers to fight it out amongst themselves without the respondents having to wait for their money. This payment was made in March, 1944, after action brought. On making payment each fire insurance company obtained a document, headed "Receipt, "transfer and subrogation", in the following terms:—

"Sherwin-Williams Company of Canada, Limited, the under-"signed, hereby acknowledges to have received at the execution "hereof from................Company................dollars, being the "latter's pro rata proportion of the sum of forty-six thousand "nine hundred and thirty-one dollars and twenty-eight cents "($46,931.28) now claimed by the undersigned from Boiler "Inspection and Insurance Company of Canada, by action insti-"tuted in the Superior Court for the District of Montreal, under "the number 221869 of the records of the said court, as being "the amount of loss or damage to the property of the under-"signed, alleged to have been suffered on the second of August, "nineteen hundred and forty-two, as a result of an accident "consisting of a sudden and accidental tearing asunder of a "steam-jacketed bleacher tank, at the premises of the under-"signed in the City of Montreal.

"In consideration of the aforesaid payment of.............. "dollars to the undersigned, by the above-named company, the "undersigned hereby transfers, assigns and makes over unto the "said company in the proportion that the sum now paid bears "to the sum of forty-six thousand nine hundred and thirty-one "dollars and twenty-eight cents ($46,931.28), all the under-"signed's rights, title and interest in and to the claim of the "undersigned against the said Boiler Inspection and Insurance "Company, under the latter's policy No. 60350B dated 9th "March, 1940, issued in favour of the undersigned; hereby sub-"rogating and substituting the said...............Company in all "the undersigned's rights, title and interest in and to said claim "as well as in and to the aforesaid action and all proceedings "had thereunder, with the right on the part of the said.............. "Company to continue the said action, but at its own expense, "as of the date thereof, in the name of the undersigned and with "the benefit unto said company of all costs incurred and to be "incurred by virtue of said action, in so far and to the extent "that the undersigned is able to deal with such costs".

These documents were not served on the appellants and, indeed, they were only disclosed during the trial of the action. Some technical objections were taken to the right of the appellants to raise or rely on the plea, but they were overruled by the judge who tried the case, and their lordships are content to deal with the matter on that basis. They agree with Barclay, J., that, though the document is headed "subrogation", what has to be considered is not the title but the substance of the agreement. So regarded it is plainly a purchase of a debt by the fire insurance companies from, and an assignment to them by, the respondents. That assignment, if duly served on the debtor, would no doubt defeat the claim of the respondents and transfer it to the fire companies. The relevant sections of the Civil Code are 1570 and 1571. They are in the following terms: " 1570. The " sale of debts and rights of action against third persons, is per" fected between the seller and buyer by the completion of the " title, if authentic, or the delivery of it, if under private signature. " 1571. The buyer has no possession available against third " persons, until signification of the act of sale has been made, " and a copy of it delivered to the debtor. He may, however, " be put in possession by the acceptance of the transfer by the " debtor, subject to the special provisions contained in article " 2127 ".

In the present case, as the Supreme Court pointed out, the sale has no doubt been perfected between buyer and seller, but there has been no signification of the act of sale or delivery of a copy to the debtor, nor has there been any acceptance by the appellants of the transfer of their liability to the fire companies, if any liability existed. On the contrary, they denied liability throughout. Their Lordships cannot accept the view that proof of payment by the fire companies and of the transfer of the debt from seller to buyer is a sufficient signification of the act of sale within the meaning of s. 1571.

Signification implies an act on the part of the buyer or seller, as opposed to acceptance of the transfer by the debtor, whereby the buyer is enabled to sue him. Here there was no act by buyer or seller and therefore no signification by either. The case accordingly differs on the facts from *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.* (29), where the assignee took action in his own name against the debtor and was thereby held to have given signification of the act of sale. Nor are their Lordships able to accept the contention that a denial of the transfer followed by proof of its existence at the trial alters the position. It rather showed that the respondents, so far from signifying the change, expressly avoided doing so.

The appellants, however, rely upon arts. 77 and 81 of the Code of Civil Procedure, which are in the following terms: " 77. No person can bring an action at law unless he has an " interest therein. Such interest, except where it is otherwise " provided, may be merely eventual. 81. A person cannot use " the name of another to plead, except the Crown through its " recognized officers ". They maintain that the respondents having been paid in full have no longer any interest in the action. Their Lordships do not agree.

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(29) [1903] A. C. 59.

It is true that payment in full has been made, not, however, because the fire companies admitted any liability, but because it was doubtful on whom the liability fell. As between the appellants and the respondents, the debt was still due to the latter, and by the very terms of the transfer they were under an obligation to continue the action or allow it to be continued in their name. They would have been in breach of their contract had they not done so: it was still *their* action and the fire companies were not using the respondents' name to plead. Their Lordships therefore agree with all the judges in Canada that this plea cannot prevail.

Once it is decided that the respondents are not precluded from suing owing to the fact that they have received payment from the fire companies, the question of the cause of the loss and the exclusion of fire from the risks covered has to be faced. On these points the appellants succeeded in the Court of King's Bench (Letourneau, C.J., dissenting), and received the support of Rand, J., in the Supreme Court.

On their behalf it was said, in the first place, that explosion was not the risk covered. It was the tearing asunder of the boiler against which insurance was given, and in this case it was the explosion, and not the accident to the boiler, which did the damage. This argument, it is maintained, receives support from the provision that direct damage alone is covered, and loss from any indirect result of an accident is expressly excluded. The only direct damage, it was contended, was the injury to the boiler itself, and the cost of repairing it was infinitesimal. So narrow an interpretation of the wording of the policy is not, as their Lordships think, justified, the more so having regard to the terms of s. 4 of the policy, which expressly grants an indemnity against payments to injured servants. Clearly, something more than the mere bursting of the tank was contemplated, but this conclusion still leaves open the question whether the explosion which followed was the direct result of the accident to the tank.

Whatever meaning the word " direct " may have in qualifying the word " result ", it does not imply that there can be no step between the cause and the consequence. It is unnecessary to multiply examples. *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (30) sets forth the principle; though Lord Dunedin's words at p. 363 will require consideration later. At p. 362, however, he says: " I think the case turns on a pure " question of fact to be determined by common-sense principles. " What was the cause of the loss of the ship? " To the like effect are Lord Wright's words in delivering the judgment of the

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(30) [1918] A. C. 350.

Board in *Canada Rice Mills Ld.* v. *Union Marine and General Insurance Co.* (31): " It is now established by such authorities " as *Leyland Shipping Co.* v. *Norwich Union Fire Insurance* " *Society*, and many others, that causa proxima in insurance law " does not necessarily mean the cause last in time, but what is " ' in substance ' the cause, . . . or the cause ' to be determined " ' by common-sense principles ' ".

If this be, as their Lordships believe, the true view, then the matter is concluded by the evidence of Dr. Lipsett, which was accepted by the judge who tried the case. It would be a miracle, he said, if the vapour did not explode when it was released in the circumstances then existing. When one is considering only whether the explosion was the direct result of the tearing asunder of the tank, and disregarding the question whether the exception of fire from the risk frees the appellants from liability, it matters not that the escaping fumes required to be mixed with air before they became explosive or that some source of ignition was required. Both these steps were the natural, indeed almost the inevitable, consequence of the original rupture, and therefore its direct result.

There remains the more difficult question whether the exclusion of loss from fire prevents the respondents from recovering. Undoubtedly, no explosion would have taken place without some source of ignition. One suggested source was the heated door of the tank. Dr. Lipsett thought this a possible method of ignition inasmuch as if heated to 484 degrees it would have reached a temperature high enough to ignite the gas. But he regarded this result as unlikely, and though the judge speaks of an unascertained source of ignition, he does, their Lordships think, consider that the most probable cause was a spark or gas jet or open fire in a grate. He does not in terms reject the heated door, but regards it as an unlikely cause of the ignition of the vapour.

Some cause of the ignition there must have been, and the appellants maintain in the first place that the loss was due to fire if the combustible material was ignited by any spark or flame, and, broadly, that a combustion explosion as a rule is caused by fire. In the particular case under consideration, however, they maintain that they are on even firmer ground in that some of the respondents' witnesses did say that they saw fumes of vapour followed by fire, or a flash like fire, at the two doors. In their submission there was a fire raging in the room for some appreciable time before the final explosion took place.

In either case there is, as the judge recognizes, in some sense fire unless the unlikely cause of ignition was the heated door. An electric spark, a naked gas jet, an open fire are still fire, though they may not be fire within the exceptions contained in the policy. Still more plainly fire was at least an element in the disaster which occurred if the true view be that there was for an appreciable period of time a burning of the gases before the ultimate explosion took place.

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(31) [1941] A. C. 55, 71.

Whether an independent fire burning for an appreciable time had been generated and existed before the final explosion is, it is clear, a question of fact. The judge of first instance and four judges in the Supreme Court thought there was not. Rand, J., on the other hand, thought there was, and in their Lordships' view it was this difference in outlook which led him to dissent from the opinion of the rest of the court. He says (32): "I take the "circumstances of the loss of the appellants' property to be "these. The course of escape of gas generated in the tank by "the mixture of turpentine and the other substances, as the "pressure mounted, was first by way of the small aperture in "the manhole door or the vent at the rear, then between the "manhole door, forced outward, and the frame, and finally "through the manhole when the door was blown off. The sizzling "noise was produced in the second stage; and the first explosive "sound was the blasting of the door. The gas mixing with the "air in the room became combustible and was ignited by a spark "probably from an electric mechanism. This burning tended to "reach back toward the source of the gas and while its quantity "was limited the combustion was relatively slow and presented "flames flashing in different directions as it followed the air "currents. When the manhole opened the quantity was so "great that the rapidity and extent of combustion issued in an "explosion. Tongues of flame licked up the thin streams of "grayish gas before that point was reached; both gas and flames "were seen through both doors by the men working in the adjoin"ing room. There was this fire in the eastern room for a sensible "period of time before the explosion apart from the spark or "other source of the original ignition.

"The passage of that fire into explosion resulted from the "sudden access of the gas; if the slow feed or emission had been "maintained or if the peak pressure had been reached before the "door gave way, there would have been only the fire. In that "case it would ordinarily follow that any damage done by it, "either through the burning of property insured or by producing "other direct effects, would be fire loss.

"Whether the ignition of the gas can be said to have been "due to a fire within the meaning of the fire policies, ceases, then, "to be of importance. There was clearly a secondary stage of "fire which superseded the initial cause".

(32) [1950] S. C. R. 195–6.

Again (33): "This view differs from that of the Chief Justice "at trial in the significance attributed to the flashes of flame "previous to the explosion. He considers it too fine a distinction, "in relation to the language of the policy, to resolve the "developing explosion into stages and to treat the first and "second—the ignition and the gas combustion periods—as constituting a 'fire' existing as such, to be taken as a cause of "new consequences. But that depends on the facts and I am "unable to interpret them here as not creating an intermediate "state of fire, either of the original gases or in the initial stages "of the explosion. Time is significant and explosion was not "necessarily involved in the burning gases. The minutes or even "seconds which elapsed marked a period not of explosion but of "a state of things that, in combination with new elements, led "to explosion; the impact of the mass of gas upon the floating "fire was the same as the contact of the burning match with the "powder in *Hobbs* (34), and likewise the development of the "burning mass into explosion".

Whether he would have come to the same conclusion if the explosion had followed directly on the original ignition is at least doubtful.

In these circumstances, in their Lordships' opinion the view of the judge who saw and heard the witnesses, and could evaluate the importance to be attached to their evidence, should be followed unless there is some valid ground for rejecting it, and for differing from the supporting views of the majority of the members of the Supreme Court. In particular, the Board must be guided by the expert evidence accepted by him. The clearest expression of this evidence is to be found in the testimony of Dr. Lipsett, one of the experts called on behalf of the respondents, who stated: "If you have a tank, such as in this case, which is "generating vapours quite rapidly and filling alleyways that are "twenty-five or fifty feet long and many feet wide and many "feet high full of an inflammable mixture of turpentine vapours "and air, it would be a miracle if they did not explode".

He goes on to explain that these explosions occur in three stages and says: "In the first stage a flame moves through the "explosive mixture at a slow, more or less uniform rate of speed. "In the second stage the speed of the flame increases, and the "flame may oscillate backwards and forwards in the explosive "mixture, and there may be turbulence or a mixing up of the "gases in the mixture, and finally there is the third stage in "which the flame is accelerated in velocity to a great speed and "there is usually a loud report, and this is the stage termed "detonation". And further: "When an explosive mixture is

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(33) Ibid. 198.

(34) (1886) 12 S. C. R. (Can.) 631.

"ignited, a flame forms and moves slowly through the explosive "mixture. This slow movement may last for from a fraction of "a second to several seconds or minutes, and the rate of velocity "usually is from one foot to ten feet per second".

In view of this evidence it is perhaps desirable to repeat the evidence as to what those working in the west room observed. According to their testimony vapour and then a flash or flame was seen in one or both of the doors between the east and west rooms; the foreman then shouted to the men to get out by the fire escape; the boom was heard about the time when the first man was near the top of the escape and the second explosion occurred when the last had no more than reached the top of the ladder. As Locke, J., says, the whole sequence of events, according to the respondents' foreman, lasted only a few seconds. The Chief Justice found, and their Lordships agree with him, that the incidents from the moment when the first flash was observed until the ultimate explosion took place was all part of one momentary event. The flame was the first stage of an explosion which, in the then condition of the tank and outrush of vapour, necessarily went forward through the next stage, when the speed of the flame increased, until the final stage was reached and the explosion took place.

If this be the true view, it follows that there was no appreciable moment of time between the beginning of the ignition and the explosion. Each was a part of the same event, the ignition being the first and the explosion the final stage of the disaster. There was no separate fire which burnt in the room before the explosion took place. The flame or flash which the witnesses observed was the first stage of an explosion which immediately and inevitably followed. The fact that ignition, and in that sense fire, was an element in the ultimate result is not in their Lordships' view destructive of the respondents' claim.

It is true that a flash or flame or fire almost inevitably plays a part in many combustion explosions. But it does not follow that injury from the subsequent explosion is to be attributed to fire. The old flint lock musket required a flash in the pan to ignite the powder and drive out the bullet, but death due to the penetration by the bullet would not naturally be described as death by fire.

The judge who tried the case came to the conclusion that the ignition was due to some type of fire normally to be found in the building, e.g., a naked gas light or an electric spark, and decided that such a fire was not included within the exception. He found support for this view in the distinction drawn in the American cases, of which *Tannenbaum* v. *Connecticut Fire*

Insurance Co. (35) is an example, between a friendly and hostile fire; the former being that type which is ordinarily used in a building; the latter something on fire which ought not to be on fire. The fire in the explosive mixture he thought, and, as their Lordships have indicated, they agree with him, was merely an incident in the explosion. In this they differ from Barclay, J., who interpreted fire in the widest possible sense and thought that any accident in which fire formed an element was excluded. "If "fire," he says, "of any kind or from whatever source or when-"ever occurring, is totally excluded from the policy, the question "is solved. The subsequent exclusion of fire would seem to me "to exclude fire even if a direct cause of loss." For this opinion he finds support in *Stanley* v. *Western Insurance Co.* (36), where an exception of explosion in a fire policy was held to exclude all explosion even if caused by fire. The observations of Martin, B., are as follows (37): "There is nothing to qualify the word "'explosion', and I apprehend, therefore, that the company "bargain, and the insured agrees with them, that they are not to "be responsible for any loss or damage by explosion. The clause "is exceedingly simple, and we should not be justified in adding "words to give it the most artificial meaning which Mr. Quain "contended for".

In their Lordships' view there are always elements of danger in applying to one word the attributes which can rightly be applied to another, nor are they persuaded that "fire" in a fire policy is a simple conception. Indeed, the American differentiation between one type and another shows that it is not. Nor, in their Lordships' opinion, do the appellants establish the principles for which they contend by reliance on such a case as *Hobbs* v. *Guardian Fire and Life Assurance Co.* (38), where fire was caused by the dropping of a match into a keg of gunpowder resulting in an explosion followed by fire. The main question was whether an explosion which was caused by, and was an incident in, a fire was covered by an insurance against fire. It was held that it was so covered. Some difference of opinion between the courts in Canada seems to have arisen as to the effect of Condition No. 11 of the statutory conditions which are made applicable by the Laws of Quebec to fire insurance policies. The present wording of Condition No. 11 is set out in the Quebec Insurance Act, s. 240, para. 11. (R. S. Q., 1941, ch. 299.) But that condition deals with fire following an explosion and would impose liability on the fire companies in such a case, but is in no way concerned with fire preceding an explosion.

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(35) 193 Atlantic Rptr. 305.

(36) L. R. 3 Ex. 71.

(37) Ibid. 75.

(38) 12 S. C. R. (Can.) 631.

The judgment has been referred to and approved in *Curtis's and Harvey (Canada) Ld.* v. *North British and Mercantile Insurance Co. Ld.* (39). In that case, however, the fire burned for ten minutes before the first explosion, and it is plain from the judgment of this Board, delivered by Lord Dunedin, that what was covered was an explosion which was an incident in a fire. His words are (40): " In *Hobbs* v. *Guardian Assurance Co.* (38) " the Supreme Court of Canada decided that a policy which " insured against fire covered all loss caused by explosion which " was an incident of the fire—i.e., when a fire began without an " explosion and an explosion took place during its course and " was caused by it. Scrutton, L.J., in *In re Hooley Hill Co.* " *and Royal Insurance Co.* (41), expressed an opinion to the same " effect. Their Lordships agree with the reasoning of the learned " judges in *Hobbs'* case (38). That is an authority on what an " insurance against fire covers. *Stanley* v. *Western Insurance* " *Co.* (36) was a case which explained an exception. In that " policy, which was against fire, the insurer, in terms of the " policy, was not to be liable for loss or damage by explosion. " This expression was held to cover all loss by explosion, whether " the explosion succeeded to or was caused by a fire, or was prior " to and caused a fire ".

Both cases deal with the legal consequences which follow an explosion which is an incident in a fire, not those which follow fire which is the consequence of an explosion, and therefore have no direct bearing on the point at issue.

In their Lordships' opinion the problem may be solved in another way, as it was solved in the Supreme Court by the majority of its members. The cause of an event is, as has been pointed out in the *Leyland* case (42), to be decided on common-sense principles and to be ascertained by determining what is in substance the cause. In their Lordships' view in the present case the cause, whether it be described as dominant or proximate or by any other of the numerous epithets which have been used, was the bursting open of the door of the tank. In other respects the factory was being carried on in its normal way, and it would be an unjustified view to hold that one of the sources of ignition always present in a factory was in substance the cause of the explosion. Of course it played its part, but, as Lord Dunedin said in the *Leyland* case (43): " The moment that the two clauses " have to be construed together it becomes vital to determine " under which expression it "—i.e., the cause of the loss—" falls. " The solution will always lie in settling as a question of fact

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(39) [1921] 1 A. C. 303.
(40) Ibid. 309.
(41) [1920] 1 K. B. 257, 272.
(42) [1918] A. C. 350.
(43) Ibid. 363.

"which of the two causes was what I will venture to call (though "I shrink from the multiplication of epithets) the dominant cause "of the two. In other words, you seek for the causa proxima, if "it is well understood that the question of which is proxima is "not solved by the mere point of order in time".

If fire were the risk insured against it might well be that an explosion in which fire played a part was covered, but, when it has to be determined whether the tearing asunder of the tank or the ignition of the gases thereby released is the cause of the explosion and of the loss which it occasions, their Lordships have no hesitation in choosing the former. But, it is said, if the accident to the tank was the cause of the explosion it was also the cause of the subsequent fire, and logically, therefore, the appellants would be liable for all the damage including that done by the fire. This result would no doubt follow if there were no exception of fire, but fire is excepted. Such an exception is unnecessary if fire alone caused damage, since fire is not insured against. As Scrutton, L.J., pointed out in the *Hooley Hill* case (44), an exception of explosion in a fire policy covers an explosion caused by fire, but such an exception would be unnecessary if the explosion was not caused by fire since fire alone was covered. It is fire caused by the tearing asunder of the tank against which the insurers required protection. If the words "fire" and "explosion" be substituted one for the other the principle is the same as that applied in *Sin Mac Lines Ld.* v. *Hartford Fire Insurance Co.* (45). In other words, the insurers stipulated that they should not be liable for fire even though its dominant cause was an accident, as defined, to the tank itself. In their Lordships' view the appellants are not absolved from liability for the damage due to the explosion by reason of the exception of fire.

One final point awaits the determination of the Board, namely, the proportion of the loss which the appellants have to bear.

The clause dealing with the matter is condition 3 on the back of the policy, and is in the following terms:—"OTHER PROPERTY "INSURANCE. 3. In the event of a property loss to which both "this insurance and other insurance carried by the assured apply, "herein referred to as 'joint loss', (*a*) the company shall be "liable only for the proportion of the said joint loss that the "amount which would have been payable under this policy on "account of said loss had no other insurance existed, bears "to the combined total of the said amount and the whole amount "of such other valid and collectible insurance; or (*b*) the com"pany shall be liable only for the proportion of the said joint loss "that the amount which would have been payable under this

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(44) [1920] 1 K. B. 257, 272.

(45) [1936] S. C. R. (Can.) 598.

"policy on account of said loss had no other insurance existed, "bears to the combined total of the said amount and the amount "which would have been payable under all other insurance on "account of said loss had there been no insurance under this "policy; but this clause (*b*) shall apply only in case the policies "affording such other insurance contain a similar clause".

The argument on behalf of the appellants on this point is not, and could not be, fully developed before their Lordships having regard to the state of the record and the finding of Tyndale, J. That finding is incorporated in his judgment in the words now quoted: "Plaintiff had, at the time of the disaster, twenty-two "policies of fire insurance. They were all produced, at defen-"dant's request, as Exhibit D-6, with separate identifying num-"bers from 1 to 22; but defendant now invokes, on this point, "only one—i.e., Exhibit D-6-22, which is the policy of 'Associ-"'ated Reciprocal Exchanges'. To this policy are annexed two "supplemental contracts, on which defendant relies. Each of "these two supplemental contracts covers direct loss or damage "by explosion, subject to certain conditions and exclusions. The "exclusion relevant to the present problem relates to 'pressure "'containers'; and it is common ground between the parties "that defendant's contention depends upon whether or not the "tank was a 'pressure container'".

The judge adds: "Defence counsel, in his factum, submits "an interesting argument to establish that the tank was *not a* "'pressure' container or vessel. But three experts (Hazen, "Lipsett and Lortie) classify it as such; and they are not contra-"dicted. In view of this testimony, the court must conclude "that the tank was a 'pressure container' within the meaning "of the policy Exhibit D-6-22 and that, in consequence, *that* "*policy does not constitute other insurance concurrent with the* "*policy of defendant*".

In the view of the trial judge, therefore, the contention failed. In the King's Bench, having regard to the opinion of the majority, the question was immaterial and is not referred to. In the Supreme Court the only member who adverted to it was Locke, J., and he merely says that he agrees with the trial judge. In these circumstances no material is provided on which the Board could differ from the courts in Canada even if they had any reason for doing so. They, like Tyndale, J., reject the contention, and on the matter as a whole will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *Blake & Redden; Charles Russell & Co.*

J. C.*

1951
Mar. 6.

McDONNELL AND OTHERS . . . . . APPELLANTS;

AND

NEIL AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

Will—Construction—Bequest of residue—On trust for testator's two daughters for life in equal shares with remainder in fee to their issue in equal shares—Trust of one moiety for each daughter with remainder to her issue.

A testator by his will, after making certain specific devises and bequests, devised and bequeathed the residue of his real and personal estate upon trust "for my said two daughters G. and E. for life "in equal shares with remainder in fee to their issue in equal "shares their grandchildren if any taking per stirpes". At the date of the testator's will and of his death his daughter G. was a widow with three children, and E. was a spinster. Shortly after the testator's death E. married, and she had one child, a daughter. One child of G. predeceased her, leaving a son. Both the other children of G., who survived her, had children. E. died in 1937, and G. in 1948. An originating summons having been taken out to determine whether "the corpus of the residuary estate . . . is "divisible equally per stirpes or per capita among the children of" G. and E. respectively:—

Held, that the residuary trust for the testator's two daughters for life in equal shares with remainder in fee to their issue in equal shares ought to be construed as meaning that on the death of either daughter the gift in remainder of the equal share of the corpus, of which she had enjoyed the income during her life, was to take immediate effect. The words "with remainder" meant "with "remainder upon the determination of the precedent life estate", and pointed as clearly as would the words "at the death" to the same point of time. Accordingly, on the true construction of the will there was a trust of one moiety for G. for life with remainder to her issue and a trust of the other moiety to E. for life with remainder to her issue.

In re Hutchinson's Trusts (1882) 21 Ch. D. 811 considered.

Sumpton v. *Downing* (1947) 75 C. L. R. 76 distinguished.

Judgment of the High Court of Australia affirmed.

APPEAL (No. 14 of 1950), by special leave, from a judgment of the High Court of Australia (May 5, 1949), reversing a judgment of the Supreme Court of New South Wales (December 3, 1948), on the construction of the will of William McDonald.

By his will, dated September 11, 1902, the testator, who died on June 11, 1904, and was survived by his two daughters, Grace

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* *Present*: LORD SIMONDS, LORD MORTON OF HENRYTON, LORD MACDERMOTT, LORD RADCLIFFE and LORD TUCKER.

McDonnell, a widow, and Emily, a spinster, after making certain specific devises and bequests, left the residue of his real and personal estate on trust "for my said two daughters Grace "McDonnell and Emily Sarah McDonald for life in equal shares "with remainder in fee to their issue in equal shares their grand-"children if any taking per stirpes". At the date of the testator's will and of his death his daughter Grace was a widow with three children, and Emily was a spinster. Shortly after the testator's death Emily married, and had one child, a daughter, the present respondent. One child of Grace predeceased her, leaving a son. The two children of Grace who survived her both had children. Emily died in 1937, and Grace in 1948.

By an originating summons it was asked, inter alia, whether the corpus of the residuary estate was divisible equally per stirpes or per capita among the children of Grace and Emily respectively. The Supreme Court of New South Wales (Sugerman, J.) held that what the testator intended was a gift to the issue of his daughters in equal shares per capita, any question of stirpital division being postponed until the generation of grandchildren of the daughters.

An appeal against that decision by the daughter of Emily (the present respondent) was allowed by the High Court of Australia (Dixon and Williams, JJ., Latham, C.J., dissenting). The High Court held that the corpus of the residuary estate had been divisible since the death of Grace between the daughter of Emily as to one moiety thereof and the two children of Grace and the son of her predeceased child as to the other moiety. The children of Grace and her grandson now appealed.

1951. February 8, 12. *Upjohn, K.C.*, and *John H. Sparrow* for the appellants. The real issue is whether the gift to the children of Grace and Emily is a stirpital division or a division per capita, that is, does the share go per capita amongst the children of Grace and Emily so that it would be divisible into four parts, or does it go per stirpes, the stirpes in this case for this purpose being Grace and Emily, so that the child of Emily takes one half and the remaining half is divided between the three children of Grace. Looking at the terms of the gift, it is one gift, and it goes over after the death of the survivor of Grace and Emily. On the death of Emily, Grace was entitled to the whole income for her life—the survivor takes the whole income; that has been held in a number of authorities: *In re Telfair* (1). The gift to issue on the death of the surviving life-tenant is not

(1) (1902) 86 L. T. 496.

expressed to be per stirpes and is therefore per capita. The terms of the gift as a matter of language are "to their issue in "equal shares", and that can mean only one thing, you take all their issue and give the gift to them in equal shares. A stirpital division does not satisfy that test. Where there is a gift to their issue in equal shares, prima facie that is a gift per capita: Hawkins on Wills (2nd ed.), p. 149. It is a gift to their issue, meaning the issue of both of them. If it had been intended to give stirpitally it would have been easy to say "to their issue "in equal shares per stirpes". That was not said. The grandchildren come in and they alone take per stirpes; that necessarily means that the children are not going to do so.

Without doing violence to the language of this will the wording cannot be altered so as to make what as a matter of words is quite plain—that the gift to their issue does not mean a gift to the respective issue of the person dying. Even if that be wrong, and there is no gift over on the death of the survivor but a gift over on the death of each, it is still submitted that the words mean one thing only, it goes to their issue in equal shares—to the issue of both of them. *In re Hutchinson's Trusts* (2) is not unlike the last-mentioned point, although it went over on the death of each life-tenant, it went over to the issue of both. The attempt in *Sumpton* v. *Downing* (3) to read the words there in question as applying to their respective children failed; the court there did not hesitate to say that they must give literal effect to the terms of the gift, that was to say, it had to be on trust for the children of Mary and Elizabeth as should be living on their death. [Reference was also made to *In re Errington. Gibbs* v. *Lassam* (4); *In re Ragdale. Public Trustee* v. *Tuffill* (5); and *In re Foster* (6).] It is not suggested that the last-cited authority in any way governs the present case, but it is a useful decision for its review of the authorities. It is wrong to treat *In re Hutchinson's Trusts* (2) as laying down any rule of construction. It is an artificial rule; there can be no logical reason for any such rule, and a rule of that sort is no rule at all. An examination of the authorities which preceded *Hutchinson's* case (2) will show that any general rule cannot really be formulated; the words of each will must speak for themselves. Recent authorities show that there are as many cases where the rule has not been followed as where it has been followed. In the present case the gift is to the children of Grace and Emily per capita.

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(2) (1882) 21 Ch. D. 811, 816.
(3) (1947) 75 C. L. R. 76, 87.
(4) [1927] 1 Ch. 421, 424.
(5) [1934] Ch. 352.
(6) [1946] Ch. 135.

Raymond Jennings, K.C., and *Michael Albery* for the respondent Ena Gertrude Neil (the daughter of Emily). The actual question in issue is whether the appellants and the respondent take per capita or per stirpes. All the judges in the courts below agree that the question must be solved by deciding whether the whole mass was to go over as one whole on the death of the survivor of the two daughters of the testator, or whether on the death of the first to die one half went at once, and the other half on the death of the survivor. That is the right way to approach this question. There are three matters which the court ought to take into consideration. First, the form of the gift in each case is an important matter to observe; the gift in such cases as *Pearce* v. *Edmeades* (7) and *In re Ragdale* (8) should be contrasted with the gift in a case such as *Arrow* v. *Mellish* (9). The second matter is that the fund is not to be treated as going over in one mass where it is given to A and B as tenants in common for life with remainder to their children: *In re Hutchinson's Trusts* (10). It is not right on the natural construction that the children of both should go in. Hawkins on Wills (3rd ed.), at p. 149, sets out the general rule, and the exception is on p. 150, which is the rule in *In re Hutchinson's Trusts* (10). [Reference was also made to Jarman on Wills, Vol. 3 (7th ed.), at p. 1690.] The third general consideration is that it is unlikely that a testator making a provision for children and grandchildren does not intend to continue providing for the one branch until the head of the other branch is dead: *Wills* v. *Wills* (11); and very much the same thing was said in *Errington's* case (12).

The reasons why it is submitted that it is not right to say that in this case the estate is given over as one mass are: (i) the estate is divided ab initio; (ii) the estate is given to tenants for life as tenants in common, with remainder to their issue; (iii) the scheme of the will is to provide a home for Grace and then for Emily, and their families, and trust moneys to maintain them; (iv) the final words of the gift, " to grandchildren per stirpes ", are colourless and do not assist in the interpretation one way or the other if it is once conceded that the primary contention for the respondent is right—that there are two remainders of residue taking effect at different times and not one remainder. To construe the words "for life" as meaning "for their joint lives" and to imply cross remainders during the remainder of the life of the survivor of the life tenants does greater violence to the language used than to construe them as words of limitation applicable to the respective moieties constituted by the use of the words "in equal shares". [He was stopped.]

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(7) (1838) 3 Y. & C. Ex. 246.

(8) [1934] Ch. 352.

(9) (1847) 1 De G. & Sm. 355.

(10) 21 Ch. D. 811.

(11) (1875) L. R. 20 Eq. 342.

(12) [1927] 1 Ch. 421.

Upjohn, K.C., replied.

Raymond Jennings, K.C., submitted that the costs ought to follow the event—the case had been before two courts.

March 6. The judgment of their Lordships was delivered by Lord Simonds. This appeal from a judgment of the High Court of Australia raises a question of construction of the will of William McDonald, who died on June 11, 1904, and was survived by his daughters Grace, the widow of Percy Stanislaus McDonnell, and Emily, then a spinster.

By his will, which was dated September 11, 1902, the testator made certain specific devises and bequests as follows: (a) his residence and land at Inverary Concord on trust for his daughter Grace McDonnell for life with remainder in fee to her children and issue on the trusts therein declared with a trust over in favour of his daughter Emily and her children; (b) his furniture and other chattels in and about Inverary (with certain exceptions) to his daughter Grace; (c) his house and forty acres of land at Medlow to his daughter Emily for life with remainder in fee to her children and issue on the trusts therein declared with a trust over in favour of his daughter Grace and her children as therein mentioned. The testator then devised and bequeathed the residue of his real and personal estate on trust (subject to certain annuities thereinafter mentioned) in the following terms, which have given rise to the present dispute, namely: "for my said two daughters "Grace McDonnell and Emily Sarah McDonald for life in equal "shares with remainder in fee to their issue in equal shares their "grandchildren if any taking per stirpes". He then charged his residue with certain annuities, some of which are still subsisting, and made certain other provisions not material to the present question.

At the date of his will and of his death the state of the testator's family was as follows:—(A) His daughter Grace (who was born on December 20, 1860) was a widow with three children, namely, the appellant Stanley Augustine McDonnell (who was born on April 26, 1893), Wilfred (who was born on March 10, 1895), and the appellant Ines Marie Augusta Campbell (who was born on April 14, 1897). Grace had had one other child only, namely, Percy McDonnell, who died an infant in 1892. (B) His daughter Emily (who was born on August 11, 1865) was a spinster. On September 21, 1904, shortly after the testator's death, his daughter Emily married one Darvall. By him she had one child, the respondent Ena Gertrude, who married one Neil. Emily died on June 8, 1937. Of the children of the testator's daughter Grace, Wilfred predeceased her, leaving one child, John Arthur Xavier McDonnell, an infant, who is an appellant in this appeal. Her son Stanley, and her daughter Ines, survived her and are also appellants. Both of them had children who by representation or otherwise were made parties to the proceedings, but, conceding that they cannot take in competition with their parents, have made no claim to any interest in the testator's estate.

On July 4, 1948, Grace McDonnell died, and at once the question arose who was entitled to the corpus of the testator's residuary estate, the respondent Ena Neil claiming that she was entitled to one half of it and the children of Grace to the other half, the appellants, on the other hand, claiming that the estate was divisible in fourths, of which Ena Neil took one and each of them one fourth. But before considering the immediate question, which has given rise to differences of opinion in the Supreme Court of New South Wales and the High Court of Australia, it is necessary to mention that a similar question had arisen on the death of Emily in 1937. In that year an originating summons was taken out on behalf of the trustees of the will in the Supreme Court of New South Wales in Equity by which it was asked whether, on the true construction of the will and in the events which had happened, the respondent Ena Neil was entitled to (*a*) one half or any other and, if so, what proportion of the income of the residuary estate of the testator, and (b) a vested interest in one half or any other and, if so, what proportion of the corpus of the said estate. On the first question Nicholas, J., who heard the summons, decided that Ena Neil took no interest in the income of the estate during the lifetime of Grace, but that the latter was entitled to the whole of the income during the remainder of her life. The judge did not determine the question in regard to corpus, but directed that this part of the summons should stand over generally. Ena Neil was dissatisfied with this order but, abandoning her right of appeal from it, entered into a deed of compromise with her aunt and cousins under which (subject to the annuities) the former was to continue to enjoy one half of the income of the estate and the other half of it was to be equally divided between Ena Neil and her cousins. The income was in fact dealt with in this way during the remainder of the life of Grace. It has not been suggested in the present appeal that the order of Nicholas, J., could operate as res judicata on the question of the disposition of the corpus of the estate. Its relevance lies in the weight which must necessarily be attached to the opinion of that judge.

On the death of Grace the originating summons was duly revived and was amended by alteration of parties and by substituting for question (b) the following questions, namely, whether " (b) the corpus of the residuary estate of the above-" named testator is divisible equally per stirpes or per capita " among the children of Grace McDonnell deceased and of " Emily Sarah Darvall deceased respectively and, in the case of " the children of Grace McDonnell, which of them. (c) The " grandchildren of the said Grace McDonnell and, if so, which of " them take any interest in the corpus and, if so, what interest ". As has been already stated, it was conceded that no grandchild takes in competition with his or her parent. The only grandchild who claims an interest is the appellant John Arthur Xavier McDonnell, whose father, Wilfred, predeceased Grace.

The amended summons coming before Sugerman, J., in the Supreme Court of New South Wales, that judge gave judgment on December 3, 1948, and having first disposed of the questions of estoppel or res judicata and of the competing claims of grandchildren (which are no longer alive), on the final and more material question came to the conclusion which he summed up in these words: " In the result, and viewing the gift as a whole, I " think what the testator intended was a gift to the issue of his " daughters in equal shares per capita, any question of stirpital " division being postponed until the generation of grandchildren " of daughters and grandchildren then taking stirpitally in sub-" stitution for, and not in competition with, a parent ". It appears to their Lordships that in coming to this conclusion the judge largely relied on the opinion which he had previously expressed (agreeing therein with Nicholas, J.) that " whatever " else is obscure, it is at least clear that here there is but one " gift of the remainder ".

From this decision Ena Neil appealed to the High Court of Australia which, on May 5, 1949, allowed the appeal by a majority (Dixon, J., and Williams, J.; Latham, C.J., dissenting). In their turn the present appellants have brought this appeal by which they seek to restore the judgment of Sugerman, J. From the preceding narrative it is clear that the relevant words of the testator's will, few in number and at first reading simple enough, give rise to great difficulty, but their Lordships, having had the advantage of the careful analysis of this will and the exhaustive review of pertinent authorities which distinguish the judgments in the Supreme Court of New South Wales and the High Court of Australia, have come to the clear conclusion that the reasoning of Dixon and Williams, JJ., is to be preferred and that this appeal must be dismissed. They would, indeed, be content to adopt as expressing their own view the majority judgment of the High Court, but in deference both to the dissentient judgment and to the argument addressed by learned counsel will make the following observations.

It has already been pointed out that it was for Sugerman, J. (as it had been for Nicholas, J.) the decisive factor that there was "but one gift in remainder". The same view was taken by Latham, C.J., who agreed that the will showed an intention that the residue should be held together and that the whole income should be paid to the daughters or the survivor of them. It appears that there are two steps in this reasoning, the first, that there is only one gift in remainder, and the second, that there is by implication a gift of the whole income to the surviving daughter: by implication, for there is no such express gift. Whether, the first step being taken, it was proper to take the second, is not now the question. It may well be that, if the clear conclusion is reached that there is no gift of corpus until the death of both life tenants, a life interest in the whole corpus in favour of the survivor of them should be implied. Such a conclusion at least avoids an intestacy in one half of the income during the survivor's life and is justified by ample authority. But it is the first step which is itself open to question. It appears to their Lordships, as it did to Dixon and Williams, JJ., that without the invocation of authority or of any artificial rule of construction the residuary trust for the testator's two daughters for life in equal shares with remainder in fee to their issue in equal shares ought to be construed as meaning that on the death of either daughter the gift in remainder of the equal share of the corpus, of which she enjoyed the income during her life, is to take immediate effect. It is true that, if the will were so construed, there would be an intestacy as to one half of the corpus in the event of a daughter dying without issue, unless, indeed, cross limitations in respect of corpus can be implied with the same readiness as was a cross limitation of a life interest. But in their Lordships' opinion this consideration is outweighed by the counter-consideration that on the alternative interpretation, which Latham, C.J., favoured, if Grace had predeceased Emily, the result would have been to leave Grace's children unprovided for during Emily's lifetime except for the property specifically devised. At the date of the will Grace was a widow with three young children. It is not readily to be attributed to the testator that he intended such a disposition: see, e.g., *Wills* v. *Wills* (13).

In coming to this conclusion their Lordships do not think it necessary to look beyond the language of the will, but, in so far as cases on the construction of other wills can assist, they observe that there is a long line of authority which points in the same direction. In *In re Hutchinson's Trusts* (14), Kay, J., thought himself bound by what he regarded as a rule of construction to depart from the natural meaning (as it appeared to him) of the language he had to construe and to hold that a gift to F.H.S. and R.S. share and share alike " and after the decease " of the said F.H.S. and R.S. to their children share and share " alike and to their heirs for ever " must be construed as a gift after the respective deaths of F.H.S. and R.S. to their respective children. A similar construction has been adopted in a large number of cases, whether based on a rule or, as their Lordships prefer to think, on the intention of the testator to be gathered from the language and tenor of his will. Against this construction in the present case stress has been laid on the fact that the gift over of corpus is not expressed to take effect " at " or " upon " the " death " or " deaths " of the life tenant or life tenants. But this appears to afford no valid distinction, for the words " with remainder ", written large, mean " with remainder " on the determination of the precedent life estate " and point as clearly as do the words " at the death " to the same point of time. And it is to be noted that both in Hawkins on Wills (3rd ed.), at p. 150, and in Jarman on Wills (7th ed.), at p. 1690, the words " with remainder " are used to exemplify the so-called rule.

Learned counsel for the appellant relied also on the fact that the final words of the gift refer expressly to a stirpital distribution " their grandchildren if any taking per stirpes ". Their Lordships do not think that any weight should be given to this consideration. For whatever construction is placed on the earlier part of the gift it would be apposite to provide that the grandchildren should take per stirpes. Reliance also was placed on the fact that the gift of residue was made subject to the payment of certain annuities as indicating that the whole residue was intended to go over in one mass, and reference was made to *Sumpton* v. *Downing* (15). This case contains a valuable summary of the authorities, and it is significant that Dixon, J., who in the case now under appeal was in favour of a stirpital distribution, there held that a distribution per capita was intended. The distinction between the two cases, which their Lordships accept, is thus expressed by Dixon, J.: " . . . in that " will it was the gift of corpus which was subject to the charge " of the annuity and of income to one or both of the sisters, " whereas in the present will the whole of the trusts of residue " including those in favour of Grace and Emily are made subject " to the payment of the annuities ".

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(13) L. R. 20 Eq. 342.

(14) 21 Ch. D. 811.

Their Lordships therefore are of opinion that on the true construction of the will there was a trust of one moiety for Grace for life with remainder to her issue and a trust of the other moiety for Emily for life with remainder to her issue.

It must finally be observed that the appellants, on the footing that the construction, which alone had the favour of Sugerman, J., in the Supreme Court of New South Wales and of Latham, C.J., in the High Court, was rejected, urged a further alternative construction, namely, that on the death of Emily the corpus of one moiety was divisible in fourths between Ena Neil and the three children of Grace and that on the death of Grace a similar division of the other moiety should take place. Their Lordships do not willingly entertain a contention on which they have not the advantage of the judgment of the High Court or of the Supreme Court of New South Wales and which is not to be found in the appellants' formal case, and it appears to them sufficient to say that such a construction is clearly not admissible. For if, as has been held, the true construction of the will is that there are several trusts of each moiety, a trust of one moiety for Grace for her life and a trust of the other moiety for Emily for her life, it can only be consonant with this to interpret the remainder in fee to their issue as a remainder to their respective issue.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *G. & G. Keith; Young, Jones & Co.*

(15) 75 C. L. R. 76.

J. C.* MARK T. McKEE . . . . APPELLANT;

AND

1951
Mar. 15. EVELYN McKEE . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Infant—Custody—Paramount consideration—Welfare and happiness of infant—Existing judgment of foreign court awarding custody—Not conclusive—To be given proper weight, depending on circumstances.

In questions of custody the welfare and happiness of the infant is the paramount consideration, to which all others yield, including the order of a foreign court of competent jurisdiction. Where, therefore, there was in existence a valid order of a Californian court giving the custody of her child, born in America of American parents, to the mother, and an evasion of that order by the father in removing the child into Ontario, the court in Ontario—it being conceded that it had jurisdiction to entertain the question of custody—must form an independent judgment on the question, giving proper weight to the foreign judgment. What was proper weight depended on the circumstances of each case, and on the facts of the present case there was ample reason for the trial judge to form the opinion that he should not follow the foreign judgment without inquiry, and to come to a different conclusion as to what was for the infant's benefit.

Nugent v. *Vetzera* (1866) L. R. 2 Eq. 704, and *Di Savini* v. *Lousada* (1870) 18 W. R. 425, considered and explained.

In re Laurin (1927) 60 O. L. R. 409, following *Ward* v. *Laverty* [1925] A. C. 101, applied.

In re B's Settlement [1940] Ch. 54, approved.

Judgment of the Supreme Court of Canada [1950] S. C. R. 700, reversed.

APPEAL (No. 44 of 1950), by special leave, from a judgment of the Supreme Court of Canada (June 6, 1950), reversing a judgment of the Court of Appeal for Ontario (June 24, 1948), which had affirmed a judgment of Wells, J. (October 18, 1947), whereby the present appellant was awarded the custody of his infant son.

The appellant and the respondent were American citizens, who were married in America in 1933 and to whom a son was born in California in July, 1940. They separated in December, 1940, and on September 4, 1941, executed an agreement which provided, inter alia, that neither of them should remove the child out of the United States without the written permission of the other. By a judgment of December 17, 1942, in divorce proceedings before the Superior Court of the State of California the custody of the child was awarded to the father (the present appellant). On August 1, 1945, following applications by the father and the mother (the present respondent) the previous order as to custody was modified to provide that full custody of the infant be awarded to the mother with right of reasonable visitation allowed to the father. Thereafter, and without the consent or knowledge of the mother, the father went from the United States of America with the child into the Province of Ontario. The mother thereupon instituted habeas corpus proceedings in the Supreme Court of Ontario seeking to have the child delivered to her.

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* *Present:* LORD MERRIMAN, LORD SIMONDS, LORD MORTON OF HENRYTON, LORD RADCLIFFE and LORD TUCKER.

A writ of habeas corpus was issued on March 21, 1947, and a judgment was given by the judge before whom the return came directing the following issue to be tried: "Who is to have the "custody of the infant" as between the appellant and the respondent. Wells, J., before whom the issue came on for trial, came to the conclusion that the infant's best interests would be served by leaving him in the custody of his father. In that judgment the Court of Appeal for Ontario (Hogg and Aylesworth, JJ.A., Robertson, C.J.O., dissenting) concurred. An appeal from that decision by the mother to the Supreme Court of Canada (Kerwin, Estey, Locke and Cartwright, JJ., Taschereau, Kellock and Fauteux, JJ., dissenting) was allowed. The father now appealed. The facts appear fully from the judgment of the Judicial Committee.

1951. February 13, 14, 15, 19. *Gahan* and *G. H. Lochead* (of the Canadian Bar) for the appellant. Whether or not the appellant was in breach of the agreement of September 4, 1941, and in spite of his intention undoubtedly being to forestall any possible operation of the Californian decision, he came into Ontario with the intention of making a permanent home there for himself and the infant on a farm which he already owned there. The submission is, therefore, that when he went into Ontario he was domiciled and ordinarily resident there. Smily, J. (who directed the trial of the issue as to custody), Wells, J., who tried it, two of the three judges in the Court of Appeal for

Ontario, and three out of seven judges in the Supreme Court of Canada held that the court in Ontario was competent and, indeed, bound to examine the case with the welfare of the infant as the paramount consideration, and those judges held that in the interests of the infant the proper order was that the appellant should have the custody of the child. The Chief Justice in the Court of Appeal for Ontario and four of the judges in the Supreme Court of Canada held that the appellant and the respondent were citizens of the United States of America, that the courts in Ontario should rid themselves of this dispute between foreigners, and that therefore custody should be given to the respondent on her undertaking forthwith to take the child out of Ontario into the United States. It is submitted that that order was without justification, and that there is neither authority nor principle for such an order being made on such an undertaking. Throughout in a custody case the paramount consideration is the welfare and benefit of the infant: Infants Act, R.S.O. 1937, c. 215, s. 1. Anything that any of the parties did having any bearing on the welfare of this child was a proper fact which could and ought to have been taken into consideration, and any circumstances similarly affecting the child's welfare ought properly to be considered. Put at its highest, the relevant clause in the agreement of September 4, 1941, was a matter which ought not to have weighed to any great extent in deciding on the welfare of the infant. In any event, there are strong grounds for thinking that that agreement at the material time was not an operative agreement. Even if there had been a deliberate disregard of the agreement, that would not interfere with the court's exercise of its discretion; the relevance of the point is as to what sort of a man the appellant is.

Wells, J., put the agreement at the highest that it could be put against the appellant, and he also gave to the Californian judgment the greatest weight which, in his view, it could possibly have as a valid judgment, and he came to the right conclusion, and his order should be restored. With regard to the question of jurisdiction and the weight to be attached to the order of a foreign court in custody matters, the circumstances in *In re Ethel Davis* (1), where the Canadian court exercised jurisdiction, were not unlike those of the present case. That case was followed in *In re Chisholm* (2). On this point *In re Gay* (3) has

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(1) (1894) 25 O. R. 579.
(2) (1913) 47 N. S. Rep. 250.
(3) (1926) 59 O. L. R. 40.

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been described as the leading case in Ontario. Next, the effect of the authorities throughout, up to and including *In re B.'s Settlement* (4), has been to establish that in custody questions the welfare of the child has always been the dominant consideration: *Stuart* v. *Bute (Marquis)* (5); *Ward* v. *Laverty* (6); *In re Laurin* (7); *De Laurier* v. *Jackson* (8); *In re B.'s Settlement* (4); and *M'Lean* v. *M'Lean* (9). *Nugent* v. *Vetzera* (10) was relied on by the Chief Justice of Ontario as showing that there is some principle inconsistent with the rule of the benefit of the infant; there is nothing in that case which supports that view. [Reference in this connexion was also made to *Di Savini* v. *Lousada* (11).] Once the infant had come into Ontario from the United States there was a duty in the Canadian court to investigate the welfare of the child, and the circumstances in which he came into Ontario are merely factors to be taken into account in considering his welfare. The issue was properly directed to ascertain what order that welfare required, and the grounds as set forth in the judgment of Wells, J., and in those judgments which upheld it, were sound and fully justified the order which he made.

Lochead followed. Apart from his view as to the effect of the breach of the agreement of September 4, 1941, the judgment of the Chief Justice of Ontario amounts to an abdication of jurisdiction by the courts of Ontario to do anything else but virtually enforce the Californian judgment. That view, it is submitted, was reversed by the Supreme Court of Canada, Cartwright, J., expressly finding that the Ontario courts had jurisdiction to entertain the question of custody. If they had jurisdiction, they had no right to abdicate it, but must exercise it, and it could only be exercised by considering the welfare of the child.

Conolly Gage for the respondent. It is conceded that the Ontario court had jurisdiction to go into this matter of custody. There is, however, no absolute duty or obligation laid on the court to go anew into the whole of the facts of a custody question if it feels in the particular circumstances of the case that it is inexpedient in the interests of the child to do so, or that it also would not be in the interests of the comity of nations. Cases can arise, and this is one, where a complete investigation may be harmful to the infant. That, it is submitted, must have been the view of the Chief Justice of Ontario. Wells, J., exercised his discretion wrongly in the circumstances of this case. It is not sought to put the agreement of September 4, 1941, too high —it is merely put as a case of a person who has broken his word to his wife. What the court in Ontario was dealing with was a man who was in defiance of a court of his own country and in breach of his solemn agreement. This is a case in which the court might well say that in these particular circumstances "we "do not think that it is in the interests of the child that we "should go into the matter again, and that it would be contrary "to comity that we should do so". There is nothing in this case to displace the initial presumption that it was for the welfare of this child that he should be left in his own country. [Reference was made to *In re Willoughby* (12).] *In re B.'s Settlement* (13) does not lay down the absolute obligation to go into the whole matter again; that case can be substantially distinguished from the present case in that, (i) it was an interlocutory order of the Belgian court, and there was no real consideration of the facts of the case as to where the best interests of the child lay, and (ii) there was no evidence, as in this case, that the Belgian courts would adopt the same principles in deciding this matter as the English courts would. Circumstances can arise in which the person is not entitled as of right to have the whole case retried, otherwise, as Cartwright, J., said in the Supreme Court, it would be a direct encouragement to unscrupulous people to disobey the orders of their courts, and that might be attended by exceedingly serious consequences.

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(4) [1940] Ch. 54, 61 et seq.

(5) (1861) 9 H. L. C. 440.

(6) [1925] A. C. 101, 108.

(7) (1927) 60 O. L. R. 409, 419.

(8) [1934] S. C. R. (Can.) 149, 154.

(9) 1947 S. C. 79, 84.

(10) (1866) L. R. 2 Eq. 704, 710.

(11) (1870) 18 W. R. 425.

On the point whether in fact in this case it was to the advantage of the child to make the order that Wells, J., made, this was an American child of American parents, and sufficient consideration was not given to the circumstances in which he was brought into Ontario. Further, Wells, J., appears to have considered throughout the fitness or unfitness of the respective parties, and not what is equally important, whether it is better to bring up an American boy in Canada or in America. If the Board think that Wells, J., exercised his discretion wrongly in 1947, they should say how in the circumstances at that date he should have exercised it. In any event, the appellant should be ordered to pay the costs of the appeal; that is admittedly an

(12) (1885) 30 Ch. D. 324.

(13) [1940] Ch. 54.

unusual application to make, but in some respects this is an unusual case.

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[No reply was required.]

Lochead referred to the procedure as to costs in Ontario and submitted that costs should follow the event.

March 15. The judgment of their Lordships was delivered by Lord Simonds. This appeal is brought from a judgment of the Supreme Court of Canada, dated June 6, 1950, whereby, by a majority of four judges to three (Kerwin, Estey, Locke and Cartwright, JJ., Taschereau, Kellock and Fauteux, JJ., dissenting), an appeal by the present respondent, Evelyn McKee, from a judgment of the Court of Appeal for Ontario, dated June 24, 1948, was allowed and an order was made that the respondent, having undertaken forthwith to return with Terry Alexander McKee, the infant son of the appellant and respondent, to the United States of America and to keep the appellant fully advised as to the infant's whereabouts, should have the custody of the infant and that the appellant should deliver the infant into her custody at the time and place mentioned in the order. The order of the Court of Appeal of Ontario had by a majority (Hogg and Aylesworth, JJ.A., Robertson, C.J.O., dissenting) affirmed an order of Wells, J., of October 18, 1947, whereby sole custody of the infant son was given to the appellant. The appellant will be hereafter generally referred to as the father and the respondent as the mother. The following statement of the relevant facts is taken with some slight modification from the judgment of Cartwright, J., in the Supreme Court in which, as already stated, Kerwin, Estey and Locke, JJ., concurred.

The father is an airlines executive and has been for more than thirty-three years an attorney of the State of Michigan. The mother and the father are American citizens. They were both born in the United States of America and, until the father came to Ontario in December, 1946, in the circumstances to be mentioned hereafter, had always lived there. They were married in Vermont in 1933. The infant was born in the State of California on July 14, 1940. The parties separated in December, 1940, and have not resided together since that date. Under date of September 4, 1941, the parties executed an agreement which is referred to in the proceedings as a property settlement agreement. This agreement does not make specific reference to the question of the custody of the infant, but it contains the following paragraph: "It is further understood and agreed that neither of "the parties hereto shall remove Terry Alexander McKee, son "of the parties hereto, from or out of the United States of "America without the written permission of the party not so "removing, or wishing to remove said boy from the United "States of America". On September 18, 1941, the mother commenced an action for divorce in the Superior Court of the State of California in and for the County of Los Angeles. The father entered a cross-complaint for divorce. After a trial which occupied sixteen days and concluded on November 20, 1942, the Honourable Thurmond Clarke delivered judgment on December 17, 1942, dismissing the mother's complaint and granting the father a divorce on his cross-complaint. This judgment awarded the custody of the infant to the father, but directed that the infant should spend three months each summer with the mother. The judgment also affirmed and approved the agreement above referred to. It was conceded that this judgment was valid, and that the court had jurisdiction to pronounce it. Subsequently, there were applications by both parties to the Superior Court of the State of California for modification of this order, and certain minor modifications were made.

In May, 1945, the father made an application to the same court in California in the proceedings in which the order of December 17, 1942, as to custody had been pronounced, asking for a modification of the terms of that order as to custody. The mother delivered a cross-application and the two applications were heard together before the Honourable Ruben S. Schmidt in June, 1945. The hearing occupied five days. By order, dated August 1, 1945, the previous orders of the court were modified to provide that full custody of the infant be awarded to the mother with the right of reasonable visitation allowed to the father. The infant was not in the State of California when the application for modification was heard or when oral judgment was pronounced, but was there when the formal order of August 1, 1945, was made. That order permitted the father to have the infant in Port Austin, Michigan, until September 1, 1945, on which date it was ordered that the infant be delivered to the mother in Los Angeles, California. From this order, the father appealed to the District Court of Appeals in California, and the appeal was dismissed in November, 1946. The father applied for a re-hearing, which was denied, and then applied for leave to appeal to the Supreme Court of California, and this application was denied on December 23, 1946. Evidence was given that under the laws of the State of California these appeals

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had the effect of staying the operation of the order of August 1, 1945, until the filing of a remittitur, following their final disposition. In the result, the order of August 1, 1945, did not become effective until January 13, 1947, so that the infant continued to be in the custody of the father except that he spent three months with the mother during the summer of 1946.

On or about December 24, 1946, the father, who was then residing with the infant at Port Austin, Michigan, received word that his final appeal had failed, and he thereupon proceeded with the child into the Province of Ontario. He did this without the permission or knowledge of the mother, who was not able to discover the whereabouts of the father and the infant until some time in the month of February, 1947. She then instituted habeas corpus proceedings in the Supreme Court of Ontario seeking to have the infant delivered to her. Her application was supported by her own affidavit setting out the relationship of the parties, the place and date of the infant's birth, the delivery of the judgment of the Honourable Ruben Schmidt, and the denial of the father's appeal. The affidavit further stated that on or about December 24, 1946, the father, without any knowledge or consent on the part of the mother and with intent to deprive her of the lawful custody of the infant, had brought him to the city of Kitchener and was there detaining him. A copy of the judgment of the Honourable Ruben Schmidt was made an exhibit to this affidavit.

A writ of habeas corpus was issued on March 21, 1947, pursuant to the order of Treleaven, J., and the return came before Smily, J., on March 25, 1947. By way of return to the writ, the father filed a lengthy affidavit. In this he stated that at the date of his marriage to the mother he was domiciled and ordinarily resident in the State of Michigan and had continued to be domiciled and ordinarily resident there until December, 1946, when he had moved to Ontario, and that he intended to make his permanent home in Ontario. He made numerous allegations reflecting on the character of the mother. He questioned her fitness to have the custody of the infant and stated that in his opinion it was better for the infant to be in his custody than in that of the mother. He claimed that the order of the Californian court of August 1, 1945, was made without jurisdiction, and would not be enforceable in the State of Michigan. The affidavit contained no denial of the statement in the mother's affidavit that he, without any knowledge or consent on her part and with intent to deprive her of the lawful custody of the infant, had brought him to the city of Kitchener.

Smily, J., reserved the matter, and on April 2, 1947, gave judgment directing the trial of an issue. The question directed to be tried was: "Who is to have the custody of the infant, "Terry Alexander McKee, as between the said Evelyn McKee "and the said Mark T. McKee?". This order did not in terms refer the final disposition of the proceedings on the writ of habeas corpus to the judge trying the issue, as it might have done under the provisions of r. 233, but Wells, J., before whom the issue came on for trial, proceeded as if the final determination of the whole matter had been referred to him. It is not necessary to decide whether the practice which was followed was technically correct, for it is now common ground that, the matters in dispute having been fully investigated on their merits, no technical defect in procedure should be allowed to render the proceedings abortive.

From this brief recital of the facts as stated by Cartwright, J., it is clear that it was the duty of Wells, J., to determine the issue before him by reference to the familiar principles which are applicable in regard to the custody of infants and in Ontario are embodied in the Infants Act, R.S.O., 1937, ch. 215. It was not, and could not, be argued before their Lordships' Board that the courts of Ontario had not jurisdiction to decide this issue. The infant was resident, if not domiciled, in the province: he was within the King's allegiance and entitled to the protection of his courts: he was an infant and therefore entitled to the special protection owed by the King as parens patriae to infants. Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

It is important, then, to see what course was taken by Wells, J., in a case which undoubtedly presented some features of difficulty. The trial before him occupied eleven days. In the course of it the father and mother were examined and cross-examined at some length. No circumstance which could be regarded as in any way relevant to the welfare of the infant was ignored. The judge, accompanied by counsel, went to the farm where the infant was living and saw for himself what were the conditions of his life. Having done so, he delivered a considered judgment of which their Lordships would say, with respect, that, in its lucid exposition of the facts and relevant law and in its careful appraisement of the factors which in such a case must be considered, it is open to no criticism. Some of his conclusions may be quoted. Of the father he said: "There were even sug-"gestions of private immorality, but in no case was anything "established, nor was any evidence adduced which I believed "which might lead one to believe that Mr. McKee's conduct had "been anything but that of an honest and upright man. Mr. "McKee in his testimony also indicated that his business affairs "were closely integrated into the life of his own children and "that of his brothers and sisters. If Terry is handed over to the "custody of his mother, there will be a breach of that association "which in later years may redound very markedly in his favour "in a financial way and in the way of the opening of proper "business opportunities to him when he is through his educa-"tion". Of the mother he said: "In my view the evidence "did not establish immorality on Mrs. McKee's part but a loose-"ness of public conduct and a lack of personal integrity and "dignity, which I think might provide a very unhappy back-"ground to the proper upbringing of the child". Of the infant's education he said: "I also had the advantage of having the "child's school teacher in the box and his evidence indicated "that the boy is a bright and intelligent child who is equipped to "take full advantage of a full education. I was very impressed "with the school teacher's attitude towards the child and I think "he is presently in safe hands in so far as his schooling is con-"cerned at the present time. He is attending a small country "school about two miles from his home at Linwood outside of "Kitchener". Finally, after referring to his visit to the child, he said: "While the equipment of the farmhouse is simple to "the point of austerity it is entirely adequate and I am not able "to see that the boy is suffering at the present time either in lack "of domestic care or in lack of educational facilities which he "may require. I think he is well served in both. Looking at the "whole matter his welfare seems inextricably bound up with the "care, advice and education which his father can now give him, "and I think his interests will best be served by leaving him "where he is in the custody of Mark T. McKee".

In this judgment the majority of the Court of Appeal for Ontario concurred, nor, though Robertson, C.J.O., in that court and Cartwright, J., in the Supreme Court of Canada made some criticisms on this aspect of the judgment, does it appear that they would have thought fit to reverse the order of the trial judge but for two considerations to which reference must now be made. The first consideration, which has already been mentioned, is that the father's action in taking the infant out of the United States was a breach of the agreement of September 4, 1941. Counsel for the father sought to justify the act by saying that the agreement had become no longer operative in this respect. But, whether or not this argument could be sustained, there appears to be no doubt that the father did not so regard it. The fact that the father had broken an agreement solemnly entered into was therefore a circumstance which the judge had to take into account and weigh in determining what was for the welfare of the child. This he expressly did, and their Lordships see no ground for saying that he gave too little weight to what was only one of many elements in the case.

The second, and more serious, consideration turns on the effect of the order of the Californian court of August 1, 1945, which became effective on January 13, 1947. The validity of this order has been challenged on the ground that the Californian court had no jurisdiction to make it. Their Lordships will, however, assume, as it has throughout been assumed, that the order was validly made. They will further assume that it was for no other reason than to remove the infant from any jurisdiction in the United States that the father took him to Ontario on December 26, 1946. It may well be that it had long been his intention one day to make his home in Ontario, but it is not open to doubt what was the immediate purpose of his action. These, then, are the facts to be considered, an order of a competent court giving custody to the mother, the deliberate evasion of that order by the father in removing the child to another jurisdiction. The matter is somewhat complicated by the fact that the father might as well in the State of Michigan, where the child was before his removal, as in Ontario, to which he was removed, have challenged the validity and effect of the order of the Californian court. But this may be disregarded by a court in Ontario, which has only to consider how it should regard the order made by a competent foreign court on a question of custody.

On this question, Wells, J., after a survey of the relevant authorities, finally expressed himself thus: "As I apprehend the "law in Ontario, even granting the validity of the Californian "judgment of 1945, it is only one of the factors which I must "consider, and the overriding factor which must guide me in my

" final decision is my view on the evidence of the welfare of the " infant ". He had already carefully considered that judgment and, in his own words, " given the greatest weight " to it. This view, which was affirmed by the Court of Appeal by a majority, then fell to be considered by the Supreme Court of Canada, and their Lordships observe that Cartwright, J., does not appear to dissent from the general proposition stated by Wells, J. Thus he says that the authorities make it clear that the Californian judgment is not binding on the courts of Ontario in the sense that a judgment for payment of a sum certain in money pronounced by a foreign court will be enforced in an action brought on the judgment in the courts of Ontario. In his view it had been rightly held that the judgment of a foreign court as to the custody of an infant need not as a matter of binding obligation be followed in the courts of Ontario, though great weight must be given to it. Such a judgment he says " would not be con- " clusive in our courts, but only of great persuasive effect ".

So far, then, there seems to be no difference of judicial opinion. But it is at this point that Cartwright, J., appears to their Lordships to adopt a line of reasoning which cannot be supported. For, after re-affirming " the well established general " rule that in all questions relating to the custody of an infant " the paramount consideration is the welfare of the infant ", he observed that no case had been referred to which established the proposition that, where the facts were such as he found them to exist in the case, the salient features of which have been stated, a parent by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the court, whose jurisdiction he himself invoked, becomes " entitled as of right to have the whole " question retried in our courts and to have them reach a new " and independent judgment as to what is best for the infant ". And it is, in effect, because he held that the father had no such right that the judge allowed the appeal of the mother, and that the Supreme Court made the order already referred to.

But, with great respect to the judge, this was not the question which had to be determined. It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. But it is the negation of the proposition, from which every judgment in this case has proceeded, namely, that the infant's welfare is the paramount consideration, to say that where the trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case could be justified. But if so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant.

It cannot be ignored that such consequences might follow as are suggested by Cartwright, J. The disappointed parent might meet stratagem by stratagem and, taking the child into the Province of Manitoba, invoke the protection of its courts, whose duty it would then be to determine the question of custody. That is a consideration which, with others, must be weighed by the trial judge. It is not, perhaps, a consideration which in the present case should have weighed heavily.

It has been said that the weight or persuasive effect of a foreign judgment must depend on the circumstances of each case. In the present case there was ample reason for the trial judge, in the first place, forming the opinion that he should not take the drastic course of following it without independent inquiry and, in the second place, coming to a different conclusion as to what was for the infant's benefit. For not only was the child two years older at an age when two years make a material difference, but the facts, which, as appeared on the face of the Californian order, had influenced that court had substantially changed. No longer was the choice between California and "a "place not accessible, snowbound in winter": no longer was the child under the care and supervision for most of the time of aged employees hired by the father, nor was he many miles from adequate transportation and adequate school facilities. This

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conspicuous change of circumstances demanded an independent inquiry, and their Lordships see no reason for thinking that the judge, whose full and exhaustive inquiry they have already recognized, came to a wrong conclusion.

In the course of the proceedings a large number of authorities have been discussed. It is necessary only to refer to them shortly. For their Lordships concur in the review of them which is to be found in the judgment of Kellock, J., in the Supreme Court of Canada. It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody: see *In re Laurin* (14), following *Ward* v. *Laverty* (15). So, also, it is the law of Scotland (see *M'Lean* v. *M'Lean* (16)) and of most, if not all, of the States of the United States of America. To this paramount consideration all others yield. The order of a foreign court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment: comity demands, not its enforcement, but its grave consideration. This distinction, which has long been recognized in the courts of England and Scotland (see *Johnstone* v. *Beattie* (17) and *Stuart* v. *Bute (Marquis)* (18)), and in the courts of Ontario (see, e.g., *In re Ethel Davis* (19) and *In re Gay* (20)), rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final.

Counsel relied (as had the Supreme Court of Canada) on the observations of Page Wood, V.-C., in *Nugent* v. *Vetzera* (21) and of James, V.-C., in *Di Savini* v. *Lousada* (22). It is true that in both these cases particular emphasis was laid on the respect to be paid by an English court to a foreign judgment relating to custody. But in the former case Page Wood, V.-C., was careful to observe that he guarded himself against anything like an abdication of the jurisdiction of his court to appoint guardians. This can only mean that, if he thought that the welfare of the infants required the appointment of guardians by an English court, he would appoint them notwithstanding the foreign order. There is in fact no via media between the abdication of jurisdiction, which he rejected, and the consideration of the case on its merits, in which the respect payable to a

(14) 60 O. L. R. 409.
(15) [1925] A. C. 101.
(16) 1947 S. C. 79.
(17) (1843) 10 Cl. & F. 42.
(18) 9 H. L. C. 440.
(19) 25 O. R. 579.
(20) 59 O. L. R. 40.
(21) L. R. 2 Eq. 704.
(22) 18 W. R. 425.

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foreign order must always be in the foreground. In the latter case James, V.-C., used language which appears to amount to blind surrender to a foreign order. "I think", he said, "that "I am bound without exercising any judgment of my own to "recognize their authority". "Their" authority appears to mean the authority of the Italian guardians who had been appointed by an Italian court, though this is not quite clear. If the Vice-Chancellor intended by this observation to apply a general proposition, their Lordships cannot accept it as an accurate statement of the law. It is, however, probable that he no more than Page Wood, V.-C., intended an abdication of jurisdiction. In their Lordships' opinion the nature and limits of the jurisdiction of a court alike in England and Ontario in relation to the custody of an infant are correctly stated by Morton, J., in *In re B.'s Settlement* (23). But they would add that too much stress should not be laid on the provisions of the Guardianship of Infants Act, 1925. Section 1 of that Act introduced no new principle of law, but merely enacted the rule which had long been acted on in the Chancery Division of the High Court of Justice: see *In re Thain* (24). It is true, as pointed out in the judgment of Cartwright, J., that the judgment in *In re B.'s Settlement* (23) has been criticized by some writers whose opinions are entitled to consideration, but it has not, so far as their Lordships are aware, been the subject of adverse judicial comment. In their opinion it is not only consistent with authority but, as they have already observed, proceeds inevitably from the nature of the jurisdiction and of the subject matter in regard to which it is exercised.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and that the judgment of the Court of Appeal for Ontario dismissing an appeal from an order of Wells, J., of October 18, 1947, should be restored. The orders as to costs made by the Court of Appeal for Ontario and Wells, J., will stand and the order as to costs made by the Supreme Court of Canada will be varied by providing that each party will bear his or her own costs. There will be no costs of the appeal to His Majesty in Council.

Solicitors: *Charles Russell & Co.; Hancock & Scott.*

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(23) [1940] Ch. 54.

(24) [1926] Ch. 676.

PARIS . . . . APPELLANT;

AND

STEPNEY BOROUGH COUNCIL . . . RESPONDENTS.

H. L. (E.)*

1950
Oct. 26, 30;
Nov. 2;
Dec. 13.

Master and servant—Accident to servant—Safe system of work—Servant with only one eye—Other eye injured—Risk of greater injury—Master's obligation.

A workman employed as a garage hand had, to the knowledge of his employers, only one good eye. In working on the back axle of a vehicle to remove a U-bolt, which had rusted in, he struck it with a hammer and a metal chip flew off seriously injuring his good eye. He was not wearing goggles. He claimed damages against his employers in respect of that injury on the ground that they were negligent in failing to provide and require the use of goggles as part of the system of work.

Held, that, in the case of a workman suffering, to the employer's knowledge, from a disability which, though it did not increase the risk of an accident occurring, did increase the risk of serious injury if an accident should befall him, the special risk of injury is a relevant consideration in determining the precautions which the employer should take in the fulfilment of the duty of care which he owes to the workman.

Held, further, (per Lord Normand, Lord Oaksey and Lord MacDermott, Lord Simonds and Lord Morton of Henryton dissenting) that the evidence was sufficient to sustain the finding that the employers were negligent in failing to provide this workman with protective goggles for work of this description, and that he was entitled to damages.

Per Lord Simonds and Lord Morton of Henryton. The degree of risk of any injury, whether to a one-eyed or a two-eyed man, did not, on the evidence, demand this precaution by the employers.

Decision of the Court of Appeal, [1950] 1 K. B. 320, reversed.

APPEAL from the Court of Appeal (Lord Goddard, C.J., Asquith, L.J., and Vaisey, J.).

The facts, as summarized from their Lordships' opinions, were as follows:—On May 13, 1942, the workman (the appellant) entered the service of the employers (the respondent council) as a garage hand in their cleansing department, where he worked as a fitter's mate on the maintenance, repair and dismantling of vehicles. He was then, for all practical purposes, blind in his left eye, owing to a permanent defect of its vision, due to his having suffered serious injury in May, 1941, as the result of enemy action, but this fact was not known to the employers at the time. On or about June 22, 1946, he was medically examined at the instance of his employers with a view to his becoming a member of the permanent staff and joining the superannuation scheme. The examination revealed his disablement and also, a further consequence of his war injuries, limited flexion and loss of power at the right elbow. On July 22, 1946, the medical officer reported to Charles Boden, the employers' public cleansing officer, that the workman was not fit, on account of his disablement, to join the superannuation scheme, so that thereafter the employers had notice of his disability. The workman was not accepted as a member of the permanent staff, and on May 16, 1947, he was given two weeks' notice, expiring on May 30, 1947, to terminate his employment.

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

On May 28, 1947, the workman was engaged in dismantling the chassis of a gulley cleaner, a large type of vehicle generally used by local authorities for cleansing and flushing street gulleys and sewers. The vehicle, which had been brought into the garage to be stripped for examination, was placed on a platform let into a pit in the floor from which it was raised, after the vehicle had been placed on it, to a height of about four or five feet above floor level. When the platform was in this position the workman set to work to strip the vehicle. To do this it was necessary for him to stand with his eyes level with or slightly below the part at which he was working. He first removed the nuts from the U-bolt which held the springs of the rear axle in place and cleared away the dirt from the U-bolt itself. He then, according to the ordinary practice of the garage, used an ordinary steel hammer to knock out the rusty bolt. While he was doing this a fragment of metal was broken off and lodged in his right eye, which in consequence became completely blind. The work which the workman was doing on this occasion was similar to that which he had been doing for the previous five years. Nothing in the evidence suggested that his pre-accident disabilities had increased the chances of the accident.

On August 8, 1947, the workman began an action against the employers claiming damages in respect of their negligence and/or breach of statutory duty. It was pleaded that it was their duty to provide a reasonably safe system of working. The particulars of negligence alleged by the workman included, inter alia, failure "to provide him with and require him to wear suitable goggles "to protect his eyes". The employers put in a defence denying both negligence and breach of duty and raising an alternative plea of contributory negligence. This plea was not pursued nor was the workman's claim in respect of breach of statutory duty, which was abandoned at an early stage.

From the evidence it appeared that the employers supplied goggles with tinted glasses to protect the eyes of welders against excessive light and that they also supplied goggles for men working on grinding machines, but they supplied no goggles for men employed on the maintenance and repair of vehicles.

In the workman's evidence the following passages occurred: " Q.—When you were doing this work under the vehicles, did you " find that you got grit and dirt, dust and so forth in your hair " and on your face? A.—Yes. Q.—Had you considered as to " whether it was dangerous to do this sort of job without eye " protection? A.—Well, we were always working through years " just doing the same thing. It became natural to get in there " without protection. Q.—You did not think about it? A.—We " had been doing it for years and never thought of it. Q.—Of " course, if goggles had been provided and you had been told to " use them for this job because you might get something in your " eye, would you have used them? A.—Yes ". In cross-examination the workman said that he had not complained of dirt falling, particularly into his eyes.

Arnold Seeley, a fellow workman at the garage, said that once, when he was removing corroded rust from a wheel a piece of rust flew off and caught him in the eye, but he managed to get it out. He could not say whether this was before or after the accident now in question. Lynskey, J., asked him: " Q.—Were you off " work at all with your eye? A.—Oh, no. Q.—Just that some- " thing got into your eye? A.—Yes, and I got it out ".

Thomas Reay, a motor mechanic employed in the same shop as the workman, had previously had a small business of his own in that line and before that had been an apprentice engineer. In cross-examination he said: " Q.—When you were your own " employer, did you wear goggles for such work? A.—No. " Q.—From time to time did either you or other workmates have " occasion to do precisely the same sort of job that Mr. Paris " was doing? A.—Yes. Q.—Did you wear goggles? A.—No. " Q.—Or see others wearing goggles? A.—No ".

Captain Alexander Paterson, a consulting engineer called on behalf of the workman, had had about thirty-two years' experience of maintenance of mechanical transport. He said that he had had personal knowledge of about half-a-dozen eye injuries caused by persons using a steel hammer as the workman had used it, the first about six or seven years previously. Lynskey, J., asked him: " Q.—How many times have you seen " a man wearing goggles when he was using a hammer to knock " out a rusted bolt in the course of dismantling a car? A.—I " should think on about a dozen occasions. That would be " working underneath a vehicle ".

Charles Boden, the public cleansing officer of the employers, had had experience of work in public cleansing departments of various local authorities since 1913. " Q.—Have you seen in " work of this kind workmen wearing goggles to do such work? " A.—Not in my experience. I have never seen any mechanic " working in any of the repair shops that I have visited during " that thirty-seven years wearing goggles doing that repair " work ". He said he knew that parts, including bolts, got rusted up and were hard to move. " Q.—If you strike with a " steel hammer another piece of steel, particularly a corroded " piece of steel, you may chip particles of it off? A.—It is " possible ". Asked whether he had heard that Seeley " had got " something in his eye ", he said: " It is a common occurrence " with men in the cleansing department with stuff flying about " on the vehicles ".

William Parker, until the previous February employed as mechanical superintendent in the employers' cleansing department, said: " I have seen [men] underneath a vehicle with " goggles on and preferably if they were laying on their backs " . . . I can recollect with clarity one ". He assumed it was " to prevent dust falling in his eyes ".

Lynskey, J., gave judgment in favour of the workman for 5,250*l*. damages and costs. He held that the employers, knowing that the workman had only one useful eye, were, in the circumstances, under a duty to him to provide and require the use of goggles, and that, since they had failed in that duty, the workman had established negligence on their part. The Court of Appeal set aside this judgment, holding that negligence was not established. The workman appealed to the House of Lords.

Beney, *K.C.*, *R. M. H. Everett* and *Fox-Andrews* for the appellant workman. The employers should have provided goggles for the workman to protect his eyes. Their duty to him arose out of the contract of service and was accordingly a duty to exercise reasonable care not unnecessarily to expose him to

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the risk of suffering the injurious results likely to follow an accident to his sound eye, having regard to the fact that he was known by them to be a one-eyed man. The Court of Appeal were wrong in rejecting the fact of his only having one eye as a relevant matter to be taken into account and in ruling it out altogether, for a tiny scratch on the cornea of his remaining eye might have devastating results. In such a case as this all the circumstances must be considered. Thus there might be cases where persons were put onto work involving constant scratches on the hands and if the question arose whether the employer was under a duty to provide and require the use of gloves the possibility that the use of gloves might seriously impede the work should be weighed against the risk of injury, but here it is not suggested that goggles would have impeded the work.

/The employer is bound to take account of the known disabilities of the employee. If an employer knowingly employed in a quarry a man with a piece missing from his skull he would be bound to provide him with a head covering to protect him from falling stones, though the stones would only bruise a normal man. Since that particular employee would, by reason of his disability run the risk of very serious injury, a prudent employer would provide him with special protection./ In such questions of negligence the basis on which the duty is computed is foreseeability: see *Smith* v. *Charles Baker & Sons* (1). In Salmond on Torts (10th ed.), p. 438, n. (*q*) " the seriousness of the injury " risked " is set down as a factor to be taken into consideration as well as " the likelihood of the injury being in fact caused ".

The present case was considered in 1950 in 66 Law Quarterly Review, pp. 9–10. There it was said that in the case of a warehouseman storing a first folio of Shakespeare, the duty of care was not the same as in the case of an ordinary book, and the risk of greater injury was relevant. There is no such thing as a duty of care " in the air ". An employer owes a special duty to a man known to have only one eye. The duty to supply him with goggles depends on the particular circumstances of the case and the fact that there is no duty to supply a two-eyed man with them is not conclusive, because of the degree of seriousness of the injury risked. Thus in the case of a gas company taking gas near a chest hospital where the patients would be likely to be more gravely affected by an escape than other people, that fact would be a factor in assessing the degree of care to be taken by them: see *Northwestern Utilities Ld.* v. *London Guarantee and Accident Co. Ld.* (2) and *Mackintosh* v. *Mackintosh* (3). A man's disability will render certain work unsuitable for him: see *R. Hoe & Co. Ld.* v. *Dirs* (4). But if, for example, the risk of total loss of sight in the case of a particular man is such that certain work is unsuitable for him, it may be made suitable by giving him protection. In assessing the duty one ought to look right to the end of the chain of causation to the actual result to the particular man; otherwise there is a serious whittling away of the protection to which he is entitled in industrial work. The duty is to take care in all the circumstances of the case and the state of the man is one of the circumstances to which a prudent employer should have regard: see also *Donoghue* v. *Stevenson* (5); *Bourhill* v. *Young* (6) and *Glasgow Corporation* v. *Muir* (7).

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(1) [1891] A. C. 325.

R. M. H. Everett following. This claim arises on a contract of service and the duties flowing from it: see *Wilsons & Clyde Coal Co. Ld.* v. *English* (8). So far the case has developed on the lines that there is no question that this work was dangerous for the ordinary man. Lynskey, J., treated this case as a fortiori to the case of the man with two eyes. Had it been necessary to decide it he might well have held that this was a dangerous process for ordinary people.

H. Edmund Davies, K.C., and *Alan Stevenson* for the respondent employers. The question in this case is as follows: Where a workman known by his employer to suffer from a physical disability meets with an accident in no way attributable to that disability, although the consequences are more serious because of it, is the pre-accident knowledge of the employer relevant to the question of liability? The answer is that it is not. The employers need only take account of any disability that increases the risk of an accident occurring; this is so although the duty they owe is to the individual and not to a class. Here they broke no duty which they owed to the workman and did nothing negligent, for the one-eyed condition of the man played no part in the accident. He was capable of doing and was doing the full job of a two-eyed man. The mere possibility of an accident is not enough to establish liability. In every case there is a chance of dust or rust getting into the eye of an employee. The attitude of the workman to a particular job is relevant in considering what is the scope and extent of the duty of the employer; it is not the determining factor but it is an ingredient. At no stage did this man experience or complain of any difficulty. In the case of a two-eyed man the employers owed no duty at all to supply goggles and there is no greater duty on them in the case of a one-eyed man. The duty relied on here did not arise from contract but from a relationship arising from contract. The action is in respect of tort: see *Baker* v. *James* (9) and the Crown Proceedings Act, 1947, s. 2, sub-s. 1 (*b*).

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(2) [1936] A. C. 108, 126.
(3) 1864, 2 M. 1357, 1362.
(4) [1941] 1 K. B. 34, 39.
(5) [1932] A. C. 562.
(6) [1943] A. C. 92.
(7) [1943] A. C. 448.
(8) [1938] A. C. 57, 88.

The propositions of the writer of the passage cited from the Law Quarterly Review are not supported by any authority. When the question is whether due precautions have been taken against fire there can be no difference between the case of a warehouseman storing a bound volume of last year's "Punch" and one storing a first folio of Shakespeare. On the argument for the workman if the same fire destroyed both, the owner of the latter might be able to recover while the owner of the former might not. In the case of a pawnbroker's duty to prevent pledges being stolen there would however be a distinction between the precautions necessary to prevent cheap jewellery from being stolen and those necessary to protect very valuable objects. The passage from Holmes on The Common Law, p. 154, cited in the Law Quarterly Review, should be read in its context. So should the observations of Lord Wright in *Northwestern Utilities Ld.* v. *London Guarantee and Accident Co. Ld.* (10).

In *R. Hoe & Co. Ld.* v. *Dirs* (11) the point was different from that of the present case and there was no identity between the facts: see per Goddard, L.J. (12). In Salmond on Torts (10th ed.), p. 438, the second part of n. (*q*) is supported by no decided case: see Winfield on Torts (3rd ed.), p. 398, n. (*m*) and (4th ed.), p. 412, n. (*p*) and the cases cited thereunder and the essay on Negligence by H. T. Terry in 29 Harvard Law Review, p. 40 at p. 42.

The employers' propositions may be summarized as follows: (a) What is contended for the workman is a completely novel principle applicable to all branches of negligence and entirely unsupported by reported decisions. (b) As Lord Wright said

(9) [1921] 2 K. B. 674, 681.
(10) [1936] A. C. 108, 126.
(11) [1941] 1 K. B. 34.
(12) Ibid. 42, 43.

in *Bourhill* v. *Young* (13), Lord Atkin's test in *Donoghue* v. *Stevenson* (14) establishes the "general concept of reasonable "foresight as the criterion of negligence or breach of duty". Observations such as those of Lord Dunedin in *Morton* v. *William Dixon Ld.* (15) need to be read in the light of that test. (c) The mere possibility of accident is not enough to establish liability. (d) If on the test of reasonable foresight it cannot be said that an employer might have foreseen the likelihood of an accident occurring at all, as in this case, the employer cannot be liable simply because on an accident occurring the resulting physical injuries in a particular case are far more serious owing to a pre-existing physical infirmity. (e) On the basic hypothesis it is impossible for the employer's pre-accident knowledge of his servant's infirmity to have any bearing on his legal liability where, as here, that infirmity played no part in the occurring of the accident.

Beney, *K.C.*, in reply. The fact that the workman was a one-eyed man is to be taken into account; how much weight should be attached to it is a matter of degree. If the risk of injury is more than a mere outside possibility, it is a matter of degree what precautions should be taken. The extent of the possible damage to a one-eyed man is a factor to be considered. The tests set out in the article cited from the Harvard Law Review fit this case and would impose a liability on the employers to provide goggles. If there was even a chance of one in a hundred of an accident such as this occurring that might be serious enough to a one-eyed man to impose liability on the employers. The object of the duty imposed is to prevent injury, not merely to prevent accident, and safeguarding should be directed to minimizing injury as well as preventing it and the gravity of the effect of the accident is a matter to be considered. The judgment of Lynskey, J., covers the ground it should cover and the House of Lords should not depart from his findings of fact.

Their lordships took time for consideration.

Dec. 13. LORD SIMONDS stated the facts and continued:—My Lords, the single question is whether the appellant proved negligence on the part of the respondents, a question answered

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(13) [1943] A. C. 92, 107.
(14) [1932] A. C. 562, 580.
(15) 1909 S. C. 807, 809.

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in the affirmative by Lynskey, J., in the negative by the Court of Appeal.

What, then, was the negligence alleged by the appellant and denied by the respondents? It was that it was the duty of the respondents to supply the appellant with suitable goggles for the protection of his eyes while he was engaged in such work and to require him to use them and that he failed in this duty. I can come at once to the crux of the matter. In the statement of claim this duty is pleaded as a general duty owed by the respondents to their employees engaged in this class of work: the appellant did not allege a particular duty owed to him by reason of his individual infirmity. At what stage this plea emerged is not very clear, but, having more than once read the judgment of Lynskey, J., I share the view of the Lord Chief Justice that that judge decided the case on the ground that a special duty was owed to him as a one-eyed man, and it is clear that in the Court of Appeal and in this House this was the relevant plea. The first formal reason in the appellant's case asserts the respondents' duty " to exercise reasonable care not " unnecessarily to expose the appellant to the risk of suffering the " injurious results likely to follow an accident to his sound eye " having regard to the fact that he was known by them to be a " one-eyed man ".

The issue, my Lords, is thus narrowed down and I will say at once that I do not dissent from the view that an employer owes a particular duty to each of his employees. His liability in tort arises from his failure to take reasonable care in regard to the particular employee and it is clear that, if so, all the circumstances relevant to that employee must be taken into consideration. I see no valid reason for excluding as irrelevant the gravity of the damage which the employee will suffer if an accident occurs, and with great respect to the judgments of the Court of Appeal I cannot accept the view neatly summarized by Asquith, L.J. (16) that the greater risk of injury is, but the risk of greater injury is not, a relevant circumstance. I find no authority for such a proposition nor does it appear to me to be founded on any logical principle.

But, my Lords, the gravity of the injury is only one of the relevant circumstances and, while I cannot accept the judgment of the Court of Appeal which is based on the view that it is irrelevant, unlike the majority of your lordships I find it impossible to uphold the judgment of the trial judge. For he, I think, ignored a consideration which was essential to a proper determination of the duty of the respondents to the appellant. If the gravity of the damage is relevant, so also is the seriousness of the risk, and in the consideration of this question I think that the judge fell into error. As I have already said, it is difficult to be sure what was in the mind of the judge, for, having stated (correctly, as I think) that the respondents owed a duty to the appellant individually, not to a class, he added: "In this case "the real question is whether the employers in adopting this "system and not providing or requiring the use of goggles for "the workers on this system were taking reasonable care to "provide a suitable system of work and provide a suitable "plant". But he then, without coming to any conclusion upon this question, appears to decide in favour of the appellant on the ground of his particular disability, for he concludes by saying: "I am satisfied here that there was, so far as this particular "plaintiff was concerned, a duty upon the employers to provide "goggles and require the use of goggles as part of their system". Your lordships must be left in doubt what view the judge held on what he had described as the real question, yet it was, if not the real question, a matter of fundamental importance in determining what was the nature of the risk which was run by two-eyed and one-eyed men alike. It is a question which I will now consider.

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(16) [1950] 1 K. B. 320, 324.

My Lords, a study of the evidence leaves me in no doubt that an employer could not be held guilty of negligence if he did not generally provide goggles for the use of his employees engaged in this kind of work. The respondents' public cleansing officer, Mr. Boden, to whom I have already referred, a witness of wide experience, being asked, "Have you seen in work of this kind "workmen wearing goggles to do such work?" replied, "Not in "my experience. I have never seen any mechanic working in "any of the repair shops that I have visited during that thirty-"seven years wearing goggles doing that repair work". A Mr. Reay, having served his time in the shops where he had neither himself worn nor seen others wearing goggles for such work, set up in business for himself. He was asked, "When you were "your own employer, did you wear goggles for such work?" and he answered, "No". The appellant himself gave evidence, which, so far as it bears on the obviousness of the risk and corresponding duty, cannot be disregarded. I make nothing of the fact that he did not complain that goggles were not provided, for he might well hesitate to do so. But being asked, "Have "you considered as to whether it was dangerous to do this sort "of job without eye protection?", he answered, "Well, we were "always working through years just doing the same thing. It "became natural to get in there without protection". Then he was asked, "You did not think about it?", and answered, "We "had been doing it for years and never thought of it". It is true that he added that if goggles had been provided and he had been told to use them, he would have done so. But this does not appear to carry the matter any further. For the appellant, a Captain Paterson said, in answer to the judge, that in the whole of his experience he had about a dozen times seen a man wearing goggles when he was using a hammer to knock a rusted bolt in dismantling a car, adding that that would be when working under a vehicle. It is not clear whether on these occasions the man was wearing goggles for fear of a splinter of metal piercing his eye or of grit or dirt falling into it. Mr. Parker, at the relevant time the mechanical superintendent of the respondents' cleansing department, while asserting that it was not normal practice to wear goggles for the work in question, said he had seen men, who were working underneath a vehicle, wearing goggles. That was "preferably if they were laying on their backs". Of the single instance that he could distinctly remember he assumed that the man was doing it to prevent dust getting into his eyes.

The evidence in regard to practice appears to me overwhelming. But however unlikely such an event may be in such an organized community as ours is today, it is possible that the practice, however widespread, is carried on in disregard of risks that are obvious. Let me then examine this aspect of the evidence. There was undisputed evidence that, when a piece of steel, and particularly of steel corroded with rust, is struck with a steel hammer, chips or splinters of steel may fly off. It could hardly be otherwise. But the question is what is the risk. Captain Paterson, whom I have already mentioned, deposed to having had personal knowledge of about half-a-dozen eye injuries in the course of thirty-two years' experience, the first of them having taken place some six or seven years before. A Mr. Seeley, a fellow-employee of the appellant, had a somewhat similar accident, though for him happily the consequences were trivial, at a date which could not be fixed whether before or after the appellant's accident. There is no reason to suppose that the respondents knew or ought to have known of Captain Paterson's experiences and there was nothing else.

On this evidence, my Lords, no other conclusion can be reached than that the respondents were not under a duty to provide goggles for their workmen engaged on this work, at least if they were two-eyed men, and the reason why they were under no such duty was because the risk was not one against which a reasonable employer was bound to take precautions. It was from this premise that the inquiry should proceed, whether, nevertheless, in the case of a one-eyed man they were bound to do so. This clearly must depend on whether it should be manifest to the reasonable employer that in the case of a one-eyed workman the possible damage in the event of accident was so much graver than in the case of a two-eyed workman that in the former case he ought to take precautions though in the latter case he need not. I see no justification for such a conclusion. A two-eyed man might, if a splinter struck him in the eye, suffer an injury which in any scale would be considered very grave. He might even suffer injury in both eyes either by immediate damage to both or by the infection of one from the other. The eye which was left to him might have perfect vision or might be defective in a degree varying from the slightest imperfection to almost total blindness. But, however grave, even calamitous, the damage that he suffered by the loss of one eye, the two-eyed man would have no remedy. The question therefore is not of a contrast between damage in the case of one man trivial and in the case of another very grave, but rather of an accident so serious in its consequence to any man, whether one-eyed or two-eyed, that, if the risk of it was appreciable, it would be the clear duty of the employer to provide and enforce the use of proper precautions against it. Yet the risk was not guarded against, for it was regarded, and rightly regarded, as a risk which could reasonably be run. And this was so whatever the posture which the workman assumed in doing his job. Risk cannot be assessed in terms of scientific accuracy; one speaks of " conceivable " danger and " probable " danger and the boundaries are blurred; one must, I concede, have regard to the degree of injury that an accident may cause, a difficult task enough. Taking these things into consideration and starting, as the judge did not, from the fact that, to use the familiar though inapt phrase, it was not part of the system of work to provide goggles for two-eyed men because the degree of risk did not demand that precaution in a reasonable employer, I do not think there was evidence on which it could fairly be held that the same reasonable employer was bound at his peril to provide goggles for one-eyed men. For these reasons I

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would dismiss this appeal. But as the majority of your lordships are in favour of allowing the appeal, the judgment of Lynskey, J., upon liability must be restored and it will remain for the Court of Appeal to deal with the appellant's appeal upon the quantum of damages.

LORD NORMAND. My Lords, this appeal involves a question of general importance affecting the common law duty which an employer owes to his employee. It is this: a workman is suffering, to the employer's knowledge, from a disability which, though it does not increase the risk of an accident's occurring while he is at work, does increase the risk of serious injury if an accident should befall him; is the special risk of injury a relevant consideration in determining the precautions which the employer should take in fulfilment of the duty of care which he owes to the workman?

The appellant's case is that for the sort of work that he was doing the respondents ought to have supplied him with goggles to protect his eyes. The respondents supplied goggles with tinted glasses to protect the eyes of welders against excessive light and they supplied goggles for men working on grinding machines. But they supplied no goggles for men employed on the maintenance and repair of vehicles. There was evidence from each side on the question whether it was usual for employers to supply goggles to men employed in garages on that sort of work. The weight of the evidence is decidedly against the appellant on that point. On the other hand there is proof that individual men working under a vehicle in the respondents' garage did occasionally take a pair of goggles from a cupboard in the garage and wear them to protect the eyes, and that it was known to the respondents' responsible officials that dirt did sometimes get into the men's eyes and also that when bolts were removed pieces of metal might sometimes fly. Thus, according to the public cleansing officer, it was a common occurrence that men got dirt into their eyes, and one such accident is proved by the victim, but it is not clear whether it took place before or after the accident to the appellant. The appellant depones that dirt and grit fell on to his face and into his hair when he was working under the vehicles, but he never complained about this, and never thought of the danger to his eyes.

Lynskey, J., in his judgment made no reference to the evidence of the practice followed by other employers, nor did he hold that the respondents ought to have supplied goggles to all the workers engaged on the same sort of work as the appellant. After mentioning the risk of pieces of metal flying out, and the position in which the men had to work with their eyes on a level with or below the part of the vehicle at which they were working (matters which apply to all the workmen), he emphasized the importance of the appellant's having, to the respondents' knowledge, only one useful eye. His conclusion is: "The result is, "in my view, in this case, on the evidence, . . . that I am "satisfied here that there was, so far as this particular plaintiff "was concerned, a duty upon the employers to provide goggles "and require the use of goggles as part of their system".

In the Court of Appeal the Lord Chief Justice said (17): "The "ground on which the judge has decided the present case, and "on which Mr. Beney has endeavoured to uphold the judgment, "is that because the plaintiff had only one eye the defendants "owed him a greater duty than they owed to other employees, "since the consequences of an accident would be so much more "serious". If I may respectfully say so, I think that the Lord Chief Justice correctly interpreted the judgment.

The Court of Appeal reversed the judgment for reasons which are very clearly stated by Asquith, L.J. (18): "The plaintiff's "disability could only be relevant to the stringency of the duty "owed to him if it increased the risk to which he was exposed. "A one-eyed man is no more likely to get a splinter or a chip in "his eye than is a two-eyed man. The risk is no greater although "the damage may be to a man with only one good eye than to "a man with two good eyes. But the quantum of damage is one "thing and the scope of duty is another. A greater risk of injury "is not the same thing as a risk of greater injury; the first alone "is relevant to liability". Whether that is a correct view is of considerable importance, for the ratio of the judgment will apply not only where the duty of care arises from the relationship of master and servant but in many other cases of alleged negligence.

It is not disputed that the respondents' duty of care is a duty owed to their employees as individuals. But the respondents contend that, though it is not a duty owed to the employees collectively, they must take account in fulfilling the duty only of any disability that increases the risk of an accident's occurring. For that proposition no authority was cited and in my opinion it is contrary to principle. The test is what precautions would the ordinary reasonable and prudent man take. The relevant

(17) [1950] 1 K. B. 320, 322–3.

(18) Ibid. 324.

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considerations include all those facts which could affect the conduct of a reasonable and prudent man and his decision on the precautions to be taken. Would a reasonable and prudent man be influenced, not only by the greater or less probability of an accident occurring, but also by the gravity of the consequences if an accident does occur? In *Mackintosh* v. *Mackintosh* (19) Lord Neaves, considering a case of alleged negligence in muir-burning, said: "It must be observed that in all cases the amount of care "which a prudent man will take must vary infinitely according "to circumstances. No prudent man in carrying a lighted candle "through a powder magazine would fail to take more care than "if he was going through a damp cellar. The amount of care "will be proportionate to the degree of risk run and to the "magnitude of the mischief that may be occasioned". In *North-western Utilities Ld.* v. *London Guarantee and Accident Co. Ld.* (20) Lord Wright, dealing with the risk of grave damage which may be caused by gas escaping from a main, said: "The "degree of care which that duty involves must be proportioned to "the degree of risk involved if the duty should not be fulfilled". The learned editor of Salmond on Torts (10th ed.), p. 438, n. (*q*), similarly says: "There are two factors in determining the mag-"nitude of a risk—the seriousness of the injury risked, and the "likelihood of the injury being in fact caused". These are, in my opinion, accurate statements both of the law and of the ordinary man's conduct in taking precautions for his own safety. "No reasonable man handles a stick of dynamite and a walking-"stick in the same way" (Winfield on Torts (5th ed.), p. 412).

The court's task of deciding what precautions a reasonable and prudent man would take in the circumstances of a particular case may not be easy. Nevertheless the judgment of the reasonable and prudent man should be allowed its common everyday scope, and it should not be restrained from considering the foreseeable consequences of an accident and their seriousness for the person to whom the duty of care is owed. Such a restriction, if it might sometimes simplify the task of the judge or jury, would be an undue and artificial simplification of the problem to be solved. If the courts were now to take the narrow view proposed by the respondents, the cleavage between the legal conception of the precautions which a reasonable and prudent man would take and the precautions which reasonable and prudent men do in fact take would lessen the respect which the administration of justice

(19) 1864, 2 M. 1357, 1362–3.

(20) [1936] A. C. 108, 126.

ought to command. To guard against possible misunderstanding it may be well to add here that the seriousness of the injury or damage risked and the likelihood of its being in fact caused may not be the only relevant factors. For example, Asquith, L.J., in *Daborn* v. *Bath Tramways Motor Co. Ld.* (21), pointed out that it is sometimes necessary to take account of the consequence of not assuming a risk.

I am unable, therefore, to reject the conclusion arrived at by Lynskey, J., on the ground on which the Court of Appeal proceeded. But that does not end the appeal. For there remains the question whether, assuming that the fact that the appellant was to the knowledge of the respondents a one-eyed man was a relevant circumstance, the judgment of Lynskey, J., was in accordance with the evidence. The kind of evidence necessary to establish neglect of a proper precaution was considered in *Morton* v. *William Dixon Ld.* (22) by Lord President Dunedin. That was an action by a miner against his employers alleging negligence in failing to take precautions against the fall of coal from the top of the shaft into the space between the side of the shaft and the edge of the cage. It was, of course, a Scotch case, but in my opinion there is no difference between the law of Scotland and the law of England on this point. The Lord President said (23): " Where the negligence of the employer consists of what I may " call a fault of omission, I think it is absolutely necessary that " the proof of that fault of omission should be one of two kinds, " either to show that the thing which he did not do was a thing " which was commonly done by other persons in like circum" stances, or to show that it was a thing which was so obviously " wanted that it would be folly in anyone to neglect to provide " it ". The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.

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(21) [1946] 2 All E. R. 333, 336.
(22) 1909 S. C. 807.
(23) Ibid. 809.

In the present case, as I have already said, the balance of the evidence inclines heavily against the appellant on the question of the usual practice of others. But that evidence necessarily dealt with the normal case when the employee suffers from no special disablement. In the nature of things there could scarcely be proof of what was the usual precaution taken by other employers if the workman had but one good eye. Since Lynskey, J., did not deal with the evidence on practice and made no finding about the precautions which should be taken in the ordinary case and without reference to individual disability, I think that his judgment is essentially a finding that the supply of goggles was obviously necessary when a one-eyed man was put to the kind of work to which the appellant was put.

The facts on which the judge founded his conclusion, the known risk of metal flying when this sort of work was being done, the position of the workman with his eyes close to the bolt he was hammering and on the same level with it or below it, and the disastrous consequences if a particle of metal flew into his one good eye, taken in isolation, seem to me to justify his conclusion. But even for a two-eyed man the risk of losing one eye is a very grievous risk, not to speak of the foreseeable possibility that both eyes might be simultaneously destroyed, or that the loss of one eye might have as a sequel the destruction of vision in the other. It may be said that, if it is obvious that goggles should have been supplied to a one-eyed workman, it is scarcely less obvious that they should have been supplied to all the workmen, and therefore that the judgment rests on an unreal or insufficient distinction between the gravity of the risk run by a one-eyed man and the gravity of the risk run by a two-eyed man. I recognize that the argument has some force but I do not assent to it. Blindness is so great a calamity that even the loss of one of two good eyes is not comparable; and the risk of blindness from sparks of metal is greater for a one-eyed man than for a two-eyed man, for it is less likely that both eyes should be damaged than that one eye should, and the loss of one eye is not necessarily or even usually followed by blindness in the other.

What precautions were needed to protect two-eyed men, and whether it could properly be held, in the teeth of the evidence of the usual practice, that goggles should have been supplied for them were not questions which the judge had necessarily to decide. Therefore, though there might have been advantages of lucidity and cogency if the precautions needed for the protection of the two-eyed men had first been considered and the increased

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risk of damage to which the one-eyed man is exposed had been expressly contrasted, I would allow the appeal and restore the judgment of Lynskey, J.

LORD OAKSEY. My Lords, I agree entirely with the opinion just delivered by my noble and learned friend Lord Normand.

The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The fact that the servant has only one eye, if that fact is known to the employer, and that if he loses it he will be blind, is one of the circumstances which must be considered by the employer in determining what precautions if any shall be taken for the servant's safety. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances. As the circumstances may vary infinitely it is often impossible to adduce evidence of what care an ordinarily prudent employer would take. In some cases, of course, it is possible to prove that it is the ordinary practice for employers to take or not to take a certain precaution, but in such a case as the present, where a one-eyed man has been injured, it is unlikely that such evidence can be adduced. The court has, therefore, to form its own opinion of what precautions the notional ordinarily prudent employer would take. In the present case the question is whether an ordinarily prudent employer would supply goggles to a one-eyed workman whose job was to knock bolts out of a chassis with a steel hammer while the chassis was elevated on a ramp so that the workman's eye was close to and under the bolt. In my opinion Lynskey, J., was entitled to hold that an ordinarily prudent employer would take that precaution. The question was not whether the precaution ought to have been taken with ordinary two-eyed workmen and it was not necessary, in my opinion, that Lynskey, J., should decide that question—nor did he purport to decide it, although it is true that he stated the question in one sentence too broadly as "whether the employers in adopting this system and not "providing or requiring the use of goggles for the workers on this "system were taking reasonable care to provide a suitable system "of work and to provide a suitable plant".

The risk of splinters of steel breaking off a bolt and injuring a workman's eye or eyes may be and, I think, is slight and it is true that the damage to a two-eyed workman if struck by a splinter in the eye or eyes may be serious, but it is for the judge at the trial to weigh up the risk of injury and the extent of the damage and to decide whether, in all the circumstances, including the fact that the workman was known to be one-eyed and might become a blind man if his eye was struck, an ordinarily prudent employer would supply such a workman with goggles. It is a simple and inexpensive precaution to take to supply goggles, and a one-eyed man would not be likely, as a two-eyed man might be, to refuse to wear the goggles. Lynskey, J., appears to me to have weighed the extent of the risk and of the damage to a one-eyed man and I am of opinion that his judgment should be restored.

LORD MORTON OF HENRYTON. My Lords, it cannot be doubted that there are occupations in which the possibility of an accident occurring to any workman is extremely remote, while there are other occupations in which there is constant risk of accident to the workmen. Similarly, there are occupations in which, if an accident occurs, it is likely to be of a trivial nature, while there are other occupations in which, if an accident occurs, the results to the workman may well be fatal. Whether one is considering the likelihood of an accident occurring, or the gravity of the consequences if an accident happens, there is in each case a gradually ascending scale between the two extremes which I have already mentioned.

In considering generally the precautions which an employer ought to take for the protection of his workmen it must, in my view, be right to take into account both elements, the likelihood of an accident happening and the gravity of the consequences. I take as an example two occupations in which the risk of an accident taking place is exactly equal; if an accident does occur in the one occupation, the consequences to the workman will be comparatively trivial; if an accident occurs in the other occupation the consequences to the workman will be death or mutilation. Can it be said that the precautions which it is the duty of an employer to take for the safety of his workmen are exactly the same in each of these occupations? My Lords, that is not my view. I think that the more serious the damage which will happen if an accident occurs, the more thorough are the precautions which an employer must take.

If I am right as to this general principle, I think it follows logically that if A and B, who are engaged on the same work, run precisely the same risk of an accident happening, but if the results of an accident will be more serious to A than to B, precautions which are adequate in the case of B may not be adequate in the case of A, and it is a duty of the employer to take such additional precautions for the safety of A as may be reasonable. The duty to take reasonable precautions against injury is one which is owed by the employer to every individual workman.

In the present case it is submitted by counsel for the appellant that although the appellant ran no greater risk of injury than the other workmen engaged in the maintenance work, he ran a risk of greater injury. Counsel points out that an accident to one eye might transform the appellant into a blind man, and this event in fact happened. A similar accident to one of his comrades would transform that comrade into a one-eyed man, a serious consequence indeed but not so serious as the results have been to the appellant.

My Lords, the Court of Appeal thought that the one-eyed condition of the appellant, known to his employers, was wholly irrelevant in determining the question whether the employer did or did not take reasonable precautions to avoid an accident of this kind. I do not agree. Applying the general principle which I have endeavoured to state, I agree with your Lordships and with Lynskey, J., that the condition of the appellant was a relevant fact to be taken into account.

There still remains, however, the question whether the judge rightly came to the conclusion that there was, " so far as this " particular plaintiff was concerned, a duty upon the employers " to provide goggles and require the use of goggles as part of their " system ". He thought, as I read his judgment, and as the Court of Appeal read it, that there was no duty upon the employers to provide goggles for two-eyed men who were employed on the same work as the appellant. With this latter view the Court of Appeal agreed, and I take the same view. The evidence given at the trial has already been analysed by my noble and learned friend on the woolsack, and I shall only add that, although Captain Paterson had knowledge of about half-a-dozen eye injuries in the course of thirty-two years' experience, he did not say whether any of them was of a serious nature. The only other eye injury deposed to was that of Mr. Seeley. He was asked by the judge " Were you off work at " all with your eye? ", and he answered " Oh, no ". " Just that " something got into your eye? " said the judge. " Yes, and I " got it out " replied the witness.

My Lords, is it really possible to draw a distinction, on the facts of the present case, between a two-eyed man and a one-eyed man? If the employers were not negligent in failing to provide goggles for two-eyed men doing this work, during all the years prior to this accident, did they become negligent, so far as regards the appellant alone, as from July 22, 1946, when Mr. Boden, their public cleansing officer, became aware for the first time that the appellant had practically no vision in his left eye? The loss of an eye is a most serious injury to any man, and I can only see two alternatives in this case: (a) that the employers were negligent throughout in failing to provide goggles and insist on their use by all men employed in this type of work; or (b) that the risk of an eye injury to any man was so remote that no employer could be found negligent in failing to take these precautions.

My Lords, I think the first alternative must be rejected. Applying the test laid down by Lord Dunedin in *Morton* v. *William Dixon Ld.* (24), already quoted by my noble and learned friend Lord Normand, I cannot find that the provision of goggles "was a thing which was commonly done by other persons in like "circumstances". The evidence is conclusive to the contrary. Nor does the evidence support the view that it was "a thing "which was so obviously wanted that it would be folly in any-"one to neglect to provide it". Although I recognize that the one-eyed condition of the appellant was a factor to be taken into account, I think alternative (b) is correct. I cannot reach the conclusion that a one-eyed man, but not a two-eyed man, has a remedy against the employer for so serious an injury. I think it must be both or neither, and on the facts of the present case I agree with the conclusion of the Court of Appeal, that the evidence does not establish any negligence on the part of the respondents.

I would dismiss the appeal.

LORD MACDERMOTT [after stating the facts:] My Lords, the decision of the Court of Appeal appears to have been based on two conclusions—first, that on the evidence there was no duty on the respondents to provide goggles for the ordinary, two-eyed workman engaged on this work; and, secondly, that there was therefore no such duty on the respondents in respect of the appellant because, though the consequences for him were more serious, the risk of the accident occurring was no greater in his case than it was in the case of his two-eyed fellows.

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(24) 1909 S. C. 807, 809.

The proposition underlying the second conclusion is succinctly stated by Asquith, L.J., in a passage which, I believe, represented the unanimous opinion of the court. It reads as follows (25): "The plaintiff's disability could only be relevant to the stringency "of the duty owed to him if it increased the risk to which he "was exposed. A one-eyed man is no more likely to get a "splinter or a chip in his eye than is a two-eyed man. The risk "is no greater although the damage may be greater to a man "with only one good eye than to a man with two good eyes. But "the quantum of damage is one thing and the scope of the "duty is another. A greater risk of injury is not the same "thing as a risk of greater injury; the first alone is relevant to "liability".

This view of the law raises a question of far-reaching importance for, if sound, it must, in my opinion, pervade, if not the whole domain of negligence, at least a very large part of it. It was, however, stated only in connexion with the duty of care imposed on an employer of labour and it will be sufficient for present purposes to consider it in relation to that particular branch of the law and without engaging on the wider question of its compatibility with the concept of reasonable care.

My Lords, the general nature of the obligation resting upon an employer regarding the safety of those who work for him under a contract of service is not in dispute. It is, in the words of Lord Wright in *Wilsons & Clyde Coal Co. Ld.* v. *English* (26), "to take reasonable care for the safety of his workmen". In *Smith* v. *Charles Baker & Sons* (27), Lord Herschell described the same duty somewhat more fully but without any material difference when he said: "It is quite clear that the contract "between employer and employed involves on the part of the "former the duty of taking reasonable care to provide proper "appliances, and to maintain them in a proper condition, and so "to carry on his operations as not to subject those employed by "him to unnecessary risk". It is no less clear that the duty is owed to the workman as an individual and that it must be considered in relation to the facts of each particular case.

Now, if the law is as stated by the Court of Appeal, it means that this duty of reasonable care can be discharged without regard to the gravity of the harm which is likely to fall upon the workman concerned. Reasonable care is, indeed, to be taken in respect of risk that may cause injury; but the requisite degree of care is determinable irrespective of the likely consequences for the particular workman. In short, where the risk of an injury-producing event is the same for all, the standard of reasonable care is the same towards all, and the foreseeable extent of the resulting injury in any given case becomes irrelevant to the issue of liability.

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(25) [1950] 1 K. B. 320, 324.

(26) [1938] A. C. 57, 84.

(27) [1891] A. C. 325.

My Lords, this doctrine finds no support in authority and is, in my opinion, entirely alien to the character of the relationship to which it has been applied by the Court of Appeal. For workman and employer alike such expressions as " risk ", " danger " and " safety " would lose much of their everyday meaning if divorced from the results to life and limb. In this sphere they must surely, in the very nature of things, connote consequences as well as causes. If a bricklayer says that the risk is greater at the top of a building he means that a slip there is more likely to bring him death or injury, and if he says that a particular form of scaffolding is dangerous or not safe he means not merely that it may fall, but that those who use it may get hurt. What may happen to those engaged is no less important than how it may happen. It is the consequences that necessitate the precautions in this field. The habitual association of cause and effect in workshop and factory is perhaps nowhere more clearly recognized than in the nature of some of the safeguards in common use. Suitable goggles, for example, must be worn by those employed at grinding machines. The particles that fly upward may strike the cheeks as readily as the eyes, but the eyes are protected and the cheeks are not, because the eyes are delicate organs and the consequences of their being struck are likely to be serious. Again, special precautions to prevent electric leakage are the usual practice in places like wash-houses where those working are well " earthed " and a shock might prove fatal. Instances of this sort could be multiplied, but I think it is enough to say that the employer's duty to take reasonable care for the safety of his workmen is directed—and, I venture to add, obviously directed—to their welfare and for that reason, if for no other, must be related to both the risk and the degree of the injury. If that is so and if, as was very properly conceded, the duty is that owed to the individual and not to a class, it seems to me to follow that the known circumstance that a particular workman is likely to suffer a graver injury than his fellows from the happening of a given event is one which must be taken into consideration in assessing the nature of the employer's obligation to that workman.

For these reasons I am of opinion that the Court of Appeal was wrong and that Lynskey, J., was right regarding the relevance of the respondents' knowledge of the appellant's eye defect. It remains to consider whether the trial judge's finding of negligence is justified on the evidence. As I read his judgment he did not find that the respondents were under a duty to provide goggles for other workmen engaged on the same work who had, or might be taken as having, the use of both eyes. Whether the evidence would have warranted such a finding is, I think, a question of some difficulty. On the one hand, the whole trend of the testimony indicates that it was not the general practice in garages and establishments of the kind to provide protection for the eyes in such circumstances. On the other, it is clear that the wearing of goggles would not have hampered the work in question and there is, I think, material from which it might reasonably be inferred that, for men working underneath these vehicles and in close proximity to the parts they were stripping, the provision of suitable goggles would have been a sensible and obvious way of keeping falling dirt and flying particles out of their eyes. I incline to the view that a jury weighing these considerations would not be perverse in finding that it was the duty of the employers to make such provision.

The point, however, is a balanced one and I will proceed on the assumption that the Court of Appeal was right on this aspect of the case and that the respondents were not under any general obligation of this kind. On that assumption, the question then arises whether the additional element, the fact that the respondents knew that the appellant was a one-eyed man, made it proper to arrive at a different conclusion regarding their duty to him. In my opinion it did. Not merely was the risk of this sort of accident occurring to those engaged upon this work known; it was also known that that risk was fraught with much graver consequence for the appellant than for his two-eyed companions. His chances of being blinded were appreciably greater and blindness is an affliction in a class by itself which reasonable men will want to keep from those who work for them if there are reasonable precautions which can be taken to that end. To my mind whatever may be said of the respondents' duty to their two-eyed employees, there was ample evidence to sustain the view that they failed in their duty to the appellant. I would allow the appeal and restore the finding as to liability of the judge.

Appeal allowed.

Solicitors: *Thomas V. Edwards; W. H. Thompson.*

[HOUSE OF LORDS]

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1950
Nov. 6, 7;
Dec. 14.

PRESTON-JONES . . . . . . APPELLANT;

AND

PRESTON-JONES . . . . . . RESPONDENT.

Husband and wife—Divorce—Adultery—Birth of child—Husband's absence for period between 360 and 186 days before birth—Child apparently full-time and labour normal—Period between coition and conception—Absence of medical evidence—Judicial notice of facts of nature—Possibility of birth 360 days after coition.

On a husband's petition for divorce on the ground of his wife's adultery, which she denied, it was established by evidence that during the period between 186 and 360 days before the birth of a child to her he had been continuously absent abroad, and that there had been no opportunity for intercourse between them. Evidence given by the wife that her husband had visited her about nine months before the birth was rejected by the court. The child was normally delivered and appeared a normal, healthy, full-time child. The allegation of adultery was based solely on the circumstances of its birth. A general medical practitioner, giving evidence on behalf of the husband, said, in answer to questions by the judge, that in the vagina spermatozoa would not live more than a few days at the most, and that they would be unlikely to get into the uterus; he further said that he could not give an opinion as to the maximum possible interval between the time of sexual intercourse and the time of impregnation of the ovum, but that he thought it would be a few hours; he added that he had never studied that aspect. The judge said that he was not satisfied by the evidence beyond reasonable doubt that adultery had been committed. The Court of Appeal having ordered a new trial, the husband appealed to the House of Lords.

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* *Present*: LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

Held (*per* Lord Simonds, Lord Normand, Lord Morton of Henryton and Lord MacDermott; Lord Oaksey dissenting) that the onus of proof on the husband did not extend to establishing the scientific impossibility of his being the father of the child, and that, on the whole evidence, the wife's adultery had been proved beyond reasonable doubt.

Per Lord Simonds, Lord Oaksey and Lord MacDermott (Lord Normand dubitante, and Lord Morton of Henryton dissenting). In the case of an interval of 360 days between intercourse with her husband and the birth of a child the court cannot, in the absence of further evidence, regard adultery by the wife as established.

Per Lord Simonds. When the interval diverges largely from the normal the onus of proof on the husband is light and easily discharged.

Gaskill v. *Gaskill* [1921] P. 425 considered and explained.

Decision of the Court of Appeal [1949] W. N. 339; 65 T. L. R. 620 reversed.

APPEAL from the Court of Appeal (Bucknill and Asquith, L.JJ.; Denning, L.J., dissenting).

The facts, summarized from their Lordships' opinions, were as follows: The husband (the appellant) was married to the wife (the respondent) on April 14, 1941, at Brymbo in the county of Denbigh. Jean, a child of the marriage, was born on April 15, 1942. On August 13, 1946, a second child was born to the wife. The husband, alleging that this child was not his child and founding on the circumstances of his birth a charge of adultery against the wife, on November 8, 1946, presented a petition to the High Court for the dissolution of his marriage. He alleged "that the said child was conceived some time between August 29, "1945, and February 13, 1946, during the whole of which period "of time [he] was absent from the United Kingdom and . . . "the [wife] was resident in the United Kingdom" and that the child must therefore have been conceived as the result of an act of adultery.

The petition was first heard by His Honour Commissioner Burgis, who dismissed it. The husband appealed to the Court of Appeal and that court allowed the appeal on the ground that the commissioner had largely decided the case upon evidence given by the wife which under the rule in *Russell* v. *Russell* (1) was inadmissible, set aside the order of the commissioner and directed the petition to be reheard before another judge.

The petition was reheard on March 24, 1949, by Mr. Commissioner Blanco White, K.C.

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(1) [1924] A. C. 687.

The midwife who attended at the birth gave evidence that she was called at 7.30 a.m. on August 13, 1946, and that the wife was delivered by her at 8.15 a.m. of a full-time male child weighing 8 lbs. 4 oz., which was not forced into the world, the birth being normal.

The only medical evidence was that of William Glyn Evans, whose qualifications were M.D., Edinburgh, and a Diploma of Public Health. He was a general practitioner but there was no evidence of his age or experience. He did not attend the wife in childbirth but first saw her when he examined the baby on October 12, 1946. He formed the view (which was not contested) that the child was normally developed and at birth was undoubtedly a full-time baby. Being told that it was born on August 13, 1946, he expressed the opinion that "the probable "date of conception was on or about November 6. . . . But "allowing for an extension, say, of twenty days—it has been "known—it would bring it to the second or third week in "October. . . . In my opinion the ultimate date of conception "was about October 23. . . . It would be very extraordinary if "it was conceived after November 6".

At the end of his examination in chief the commissioner thus questioned him: Q.—"What you are saying is that after a "woman becomes pregnant her periods might go on?" A.—"That is so occasionally. Once or twice it has been known they "do have periods afterwards". Q.—"Is it possible for the live "spermatozoa to get tucked away in some crevice in the vagina "or the mouth of the uterus?" A.—"Or in the tubes. But "then you do not get a natural . . .". Q.—"Spermatozoa do "live a very long time, do not they?" A.—"Yes, as long as "they are in the body, yes". Q.—"Are there not any crevices "in the vagina and the mouth of the womb where spermatozoa "might lodge?" A.—"No, my Lord, because the secretions "would destroy the spermatozoa after a time. They would in "the fallopian tube which is a tube going from the uterus to the "ovary. They do sometimes live there and develop and you get "a pregnancy in the tube, but in the vagina they would not live "more than a few days at the most". Q.—"I have heard Sir "Bernard Spilsbury speak about a case where he found the "corpse of a woman who had been drowned for three weeks with "live spermatozoa in the vagina. You say that could not happen "in a live woman?" A.—"I should think it could, but I should "think it would be very unlikely that it would ever get into "the uterus".

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This matter was not pursued in cross-examination by counsel for the wife, but the commissioner further questioned the doctor thus: Q.—" When the doctor says twenty days I think . . . he " is allowing the possibility of twenty days from sexual inter- " course to impregnation ". A.—" No, my Lord, what I mean " when I say twenty days for the gestation is 280 days, but it has " been known to go to 300 days ". At the end of his re-examination the commissioner asked: Q.—" What is the maximum " period, in your view, from the time of sexual intercourse to " the time of impregnation of the ovum?" A.—" I cannot give " an opinion on that, my Lord. I should think a few hours; but " I have never studied that aspect, my Lord ". The doctor was not asked anything by counsel on either side as to an interval between coition and fertilization.

The husband called evidence that he was not in Britain between August 18, 1945, and February 8, 1946. There was no evidence against the wife of any suspicious relations with any other man or of any looseness of conduct, nor did anything appear to suggest that she was other than a respectable hard-working woman. Certain letters, from which an inference unfavourable to her might be drawn, were admitted by the commissioner " as " evidence of the respondent's conduct, for what they are " worth ", but the rule in *Russell* v. *Russell* (2) debarred her from giving evidence with regard to them so far as they bore on the issue of legitimacy.

The wife in giving evidence in chief, apart from formal questions as to her name and address, was only asked by her counsel: Q.—" Have you ever committed adultery?" A.— " No ". Three witnesses were called on her behalf—her mother, her sister, and one Mulhern—and they gave evidence to the effect that the husband was home on leave between August and Christmas, 1945. The dates given by them were vague.

The commissioner, in his judgment, said: " I am satisfied " beyond a reasonable doubt on the evidence adduced on behalf " of the petitioner that the petitioner was not in this country " between August 17, 1945, and February 9, 1946 ". As to the letters, he said they had been admitted " for what they were " worth, as evidence of conduct only but not as evidence of any " declarations in them bearing directly upon the point whether " the child born on August 13, 1946, was legitimate or not ". As to the wife's baby, he found that it " was born to her on

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(2) [1924] A. C. 687.

"August 13, 1946, weighing 8¼ pounds, apparently normal in "every way", and added: "I am satisfied beyond a reasonable "doubt that the intercourse from which that child proceeded took "place more than 186 days before the birth of the child". As to the doctor's qualifications, he said: "His business is to bring "children into the world alive and healthy . . . he is not an "academic specialist". As to the conception, he said: "I have "no reasonable doubt that the ovum from which that child was "produced was impregnated somewhere about the normal time "before that child was born. The doubt in my mind is as to "the period which is the longest period that is practicable "between the time of coition and the time of impregnation of "the ovum; and that is a scientific question. . . . I do not "know how long spermatozoa will remain alive in the tucks and "crannies of the female genital tract. I have got no medical "evidence on the subject". He concluded: "I am not satisfied "beyond a reasonable doubt that adultery has been committed. ". . . The question reduces itself to the simple question as to "whether the court's judicial knowledge of natural laws enables "it to say without any satisfactory evidence that 360 days "between coition and birth is an impossible period and whether, "if that period elapsed, a woman, who is, so far as the rest of "the evidence goes, a respectable woman, is to be convicted of "adultery. I think not". He dismissed the petition.

The husband appealed to the Court of Appeal, which on July 22, 1949, set aside the commissioner's order and ordered the cause to be reheard by a judge of the High Court if possible. The husband appealed to the House of Lords, asking that a decree for dissolution of the marriage should be made. The wife cross-appealed, asking that the petition should be dismissed.

Sir Godfrey Russell Vick, K.C., Mars-Jones and *Scholfield* for the appellant husband. This petition should be granted and there should not be a new trial. The husband has established beyond a reasonable doubt that the child, born 360 days after the departure of the husband and six months after his return, must have been conceived in adultery. Its weight and development were normal, and the medical evidence that the normal period of gestation is 280 days, but that 300 days had been known, discharged the burden of proof. The doctor's evidence was all one way and precluded the possibility of reasonable doubt. The husband's case was sufficiently established without the letters which the commissioner admitted. Further, the court should take judicial notice of the impossibility of a normal child being born 360 days after coition. Moreover, on a question of scientific fact the court cannot consider the evidence given in some other case, even though it be recorded in the reports.

The question raised by the commissioner as to the possibility of an interval between coition and conception was sufficiently dealt with in the doctor's evidence, and reasonable diligence did not require the husband to call medical specialists to deal with it. It was a completely fresh point, since the wife's defence, which the court rejected, had been on completely different lines. She had attempted, without success, to establish a false story of the husband having been on leave about nine months before the birth. This was not consistent with her being a respectable woman with an easy conscience.

Middleton, K.C., and *Henry Brandon* for the respondent wife. The wife has stood twice in peril on a charge which is semi-criminal. The maxims, interest reipublicæ ut sit finis litium and nemo debet bis vexari pro unâ et eâdem causâ apply here, and the petition should be dismissed. It has been found that there was no evidence of loose conduct on the part of the wife. The charge of adultery rests solely on the circumstances of the birth of the child.. That charge must be proved strictly. Such a case as this should not be determined on a balance of probabilities. Further, it is not for the wife to prove affirmatively the possibility of the child being the husband's. It is for him to prove the negative. Since an adverse decision would bastardize the child, the onus is on the husband to show that it was impossible for him to be the father, and it is a heavy onus. The presumption is always in favour of legitimacy.

The law was correctly laid down in *Gaskill* v. *Gaskill* (3): see also *Head* v. *Head* (4) and *R.* v. *Luffe* (5). As to matters on which the court will take judicial notice, see *Reg.* v. *Aspinall* (6). The question here is simply whether or not the onus on the husband has been discharged. The onus probandi is the key to this case. No one knows the ultimum tempus pariendi and it has not been established by the evidence: see *Wood* v. *Wood* (7) and *Hadlum* v. *Hadlum* (8). See also Le Marchant on the Gardner Peerage Case (1828); Note E on the Banbury Peerage Case, p. 389 et seq.; and Nicolas on The Law of

(3) [1921] P. 425, 433–4.
(4) (1823) 1 Sim. & S. 150.
(5) (1807) 8 East 193, 205–6.
(6) (1876) 2 Q. B. D. 48, 61–2.
(7) [1947] P. 103.
(8) [1949] P. 197.

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Adulterine Bastardy (1836). There was no evidence on the problem of the possible interval between coition and impregnation. It is to be noted that in any case in which there was such an interval the wife would not at first know that she was pregnant.

The commissioner found that the husband had not discharged the onus of proof. He was not "satisfied on the evidence" that the case had been proved and so it was his duty to dismiss the petition: see s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937. The wife should keep the judgment which she obtained from him and there should not be a new trial. The husband should have called evidence on the problem of the possible interval between coition and impregnation and a new trial should not be granted in order to give him an opportunity of doing so: see *Shedden* v. *Patrick* (9) and *Nash* v. *Rochford Rural District Council* (10). Alternatively, if the House will not refuse the husband a decree then there should be a new trial.

Brandon following. The fact that the wife put forward the defence that her husband had been home on leave in October or November, 1945, cannot affect the possibility of a birth 360 days after coition. This case is concerned not only with alleged adultery but with legitimacy. The child is not represented and should not be prejudiced by the case made by the wife. The reluctance of the court to bastardize a child is the reason for the high standard of proof demanded in cases affecting legitimacy. In this case the wife may have been the victim of a freak of nature and in such a case it would be impossible for her at first to be aware of it. It is legitimate to look at other similar cases to see on what sort of matters evidence should be produced. The court must consider not only the interval between impregnation and birth but also that between coitus and impregnation. The commissioner was right in holding that he had no satisfactory evidence on this point. The husband should have called evidence of the best medical opinion, as in *M-T.* v. *M-T.* (11). Reasonable diligence required it. Though it is sufficient to prove adultery beyond reasonable doubt, when it is sought to prove that it is impossible for a wife's child to be also her husband's a higher test is to be applied. If a new trial is ordered the wife

(9) (1869) L. R. 1 Sc. & D. 470, 545.

(10) [1917] 1 K. B. 384.

(11) [1949] P. 331.

would have the benefit of the abrogation of the rule in *Russell* v. *Russell* (12).

Sir Godfrey Russell Vick, K.C., in reply. The court can take judicial notice of a natural impossibility: see *R.* v. *Luffe* (13). In the case of adultery the evidence must amount to proof beyond reasonable doubt: see *Ginesi* v. *Ginesi* (14) and *Miller* v. *Ministry of Pensions* (15), which indicate the law as to onus of proof. In this case the doctor in his evidence stated that spermatozoa in the fallopian tube " would not live more than a few days at the " most ". That was evidence to dispose of the suggestion as to a possible interval between coition and impregnation. The case was conducted on the lines that the wife was putting forward a pregnancy resulting from intercourse in November, 1945, and in the circumstances scientific evidence was unnecessary. The best evidence was that of the doctor and the midwife as to the fact that the child was normal.

Their Lordships took time for consideration.

December 14. LORD SIMONDS. My Lords, your Lordships have to consider an appeal by the petitioner in a divorce suit, whom I shall call " the husband ", and a cross-appeal by the respondent in that suit whom I shall call " the wife ". By his appeal the husband submits that an order of the Court of Appeal, so far as it directed that the cause should be reheard, should be set aside and that in lieu thereof a decree for dissolution of his marriage with the wife should be made. The wife by her cross-appeal submits that the order of the Court of Appeal should be set aside and the judgment of Mr. Commissioner Blanco White, whereby the suit was dismissed, should be restored.

[His Lordship stated the facts and continued:—] The commissioner expressed himself as satisfied beyond reasonable doubt that the husband was not in the United Kingdom between August 17, 1945, and February 9, 1946, and that the child born on August 13, 1946, and weighing 8¼ pounds was apparently normal in every way and could not have been begotten as the result of intercourse on or after February 9, 1946, the day on which the husband returned to the United Kingdom. The commissioner admitted in evidence certain letters written by the wife —to use his own words—" for what they were worth, as evidence

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(12) [1924] A. C. 687.
(13) 8 East 193.
(14) [1948] P. 179, 181.
(15) [1948] L. J. R. 203, 204.

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"of conduct only but not as evidence of any declarations in them "bearing directly on the point whether the child born on "August 13, 1946, was legitimate or not". It is clear that the commissioner was not influenced in favour of the husband by these letters but came to the conclusions of fact which I have stated in spite rather than because of them. I do not propose to make any further reference to them except to say that they appear irrelevant to the issue which has now to be determined and that, with great respect to the Lords Justices who thought otherwise, I can see nothing in their admission in the circumstances in which they were admitted which is fairly open to criticism. The question which then presented itself to the commissioner was whether the fact that at least 360 days elapsed between the last possible intercourse between husband and wife and the birth of the child, together with the medical evidence which was given in the case and to which I must later refer in detail, put it beyond reasonable doubt that the child was not the child of the husband. This question he answered in the negative. It is, I think, clear that he did not consider that he would be justified in finding that adultery had been committed merely on the ground of the lapse of time without medical evidence and he found the medical evidence that was adduced unsatisfactory.

The husband appealed from the order of the commissioner to the Court of Appeal, which on July 22, 1949, set it aside and ordered that the cause be reheard before a judge of the High Court if possible. From the order of the Court of Appeal the appeal and cross-appeal have been brought which I have stated at the outset of this opinion. Bucknill, L.J., with whom Asquith, L.J., agreed, expressed himself thus (16): "The commissioner in his judgment said it appeared to be a pure "question of law whether 360 days is an impossible period "without any satisfactory scientific evidence to that effect. I "myself see the case not in that light but rather as one where "the court must balance the probabilities one against the other. "On the one hand there is the very great improbability, I will "not put it any higher, that a woman can, 360 days after coitus, "give birth to a normal full-time child of 8¼ pounds without any "difficult labour, and after a pregnancy which, according to the "wife, was not unduly prolonged, but, on the contrary, was cut "short. As against this high improbability there is the fact that "the wife has put forward the case of a visit by the husband to

(16) (1949) 65 T. L. R. 620, 623.

" her in November, a case which the commissioner has not " accepted. If the matter rested there I should be in favour of " allowing this appeal ".

The Lord Justice, however, found in the admission of the letters to which I have referred a sufficient reason for ordering a re-hearing instead of granting a decree. I have already indicated that in my opinion the admission of the letters and the course taken in regard to them did not in any way prejudice the wife and I do not think that the Lord Justice was justified in the course that he took. It would appear from the passage that I have cited from his judgment that apart from this consideration he would have thought fit to grant a decree, notwithstanding the criticism of the medical or scientific evidence which had led to the commissioner refusing to do so.

Denning, L.J., dissented. He took the view that the child was obviously conceived in November, 1945, and that, once it was proved that the husband had not been in England since August, the irresistible inference was that it was conceived in adultery. " In the absence ", he said (17), " of any evidence " on the matter, I should have thought that, according to the " ordinary knowledge of mankind, a 360-day normal baby is " impossible; and the courts should not assert that it is possible " unless there is direct medical evidence to that effect. None " was produced in this case, nor in any other case so far as I " know." It appears, then, that the Lord Justice did not rely on any medical evidence that was given in the case, but thought proper to assume judicial knowledge of the material facts. This is what is intended by his reference to the " ordinary knowledge of mankind ".

It is plain, my Lords, that these appeals raise a question of peculiar difficulty, which I may state in this way: " If a husband " proves that his wife has given birth to a normal child 360 days " after he could have had intercourse with her, and no proof of " any adulterous intercourse by her is given, what, if any, further " evidence is required that the child is not his child? "

Let me first get one difficulty out of the way. A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this is in effect to bastardize the child. That is a matter in which from time out of mind strict proof has been required. But that does not mean that a degree of proof is demanded such as in a scientific inquiry would justify the conclusion that such and such an event is impossible. In this context at least no higher proof of a fact is demanded than that it is established beyond all reasonable doubt: see *Head* v. *Head* (18). To prove that a period of so many days between fruitful coition and the time of conception is in a scientific sense impossible is itself, I suppose, a scientific impossibility. The utmost that a court of law can demand is that it should be established beyond all reasonable doubt that a child conceived so many days after a particular coitus cannot be the result of that coitus. I would add that since writing this opinion I have had the advantage of reading that of my noble and learned friend Lord MacDermott and concur in what he says upon this matter.

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(17) 65 T. L. R. 624.

The question, then, that I have posed resolves itself into two parts. First, is it permissible for the court to assume judicial knowledge that beyond all reasonable doubt a normal child born 360 days after the last coitus between husband and wife is not the child of the husband? And, secondly, if not, was there evidence in the present case which the commissioner should have accepted as justifying that conclusion?

Upon the first question it has never, I think, been doubted that the court has judicial knowledge of the normal period of human gestation, though that period has from time to time been differently stated—e.g., 270 to 275 days in *Bosvile* v. *Attorney-General* (19); 273 to 280 days in *Burnaby* v. *Baillie* (20). But two doubts at once obtrude themselves. First, the word "normal" has been used, and the use of it suggests that there may be an abnormal period. Can the court altogether, and, if not altogether, within what limits, disregard the abnormal and, fastening on the normal as that of which alone it has judicial knowledge, find as a fact that adultery has been committed if the period of gestation has been abnormal and no evidence to explain it has been adduced on one side or the other? Secondly, while the court has judicial knowledge of the normal period of gestation, i.e., the period between conception (by which I mean the union of the male and female cells), and birth, can it ignore the fact, which in recent cases has been brought to its notice, that there may be that interval between coitus and conception to which I have already referred. In other words, even assuming that the court could without evidence refuse to hold that a normal child was born 360 days after conception, could it without evidence refuse to entertain the possibility of a thirty, sixty or ninety day interval between coitus and conception? These doubts that I have raised are, of course, different aspects of the same problem.

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(18) 1 Sim. & S. 150.

(19) (1887) 12 P. D. 177, 183.

(20) (1889) 42 Ch. D. 282, 296.

My Lords, I have great sympathy with the view expressed by Denning, L.J. It would, I think, appear a fantastic suggestion to any ordinary man or woman that a normal child born 360 days after the last intercourse of a man and a woman was the child of that man and it is to me repugnant that a court of justice should be so little in accord with the common notions of mankind that it should require evidence to displace fantastic suggestions. But, as so often occurs in human affairs, the difficulty lies in drawing the line. I cannot disregard the fact that in *Gaskill* v. *Gaskill* (21) Lord Birkenhead, L.C., held that in the then state of medical knowledge a period of 331 days could not be regarded as impossible, that in *Wood* v. *Wood* (22) Lord Merriman, P., in the absence of any medical evidence came to the same conclusion in regard to a period of 346 days and that in *Hadlum* v. *Hadlum* (23) a period of no less than 349 days was not regarded as impossible. I must, I think, however reluctantly, come to the conclusion that an additional period of eleven days, making 360 days in all, ought not to be regarded as making the vital difference so that the court can without any further evidence regard adulterous intercourse as proved beyond all reasonable doubt. I do not ignore that in *M-T.* v. *M-T.* (24) Ormerod, J., held that a lapse of 340 days between coitus and the birth of a normal healthy baby was impossible, but he did so upon the evidence of Sir Eardley Holland, a distinguished specialist in this branch of medicine, who said that he had never heard of an authentic case of an interval of twenty-one days between coitus and fertilization such as had been suggested as a possibility in *Gaskill's* case (25) before modern methods of examination were available, or even of an interval of fourteen days which had been referred to in *Hadlum's* case (26).

I come then to the second branch of the question that I posed, which concerns the evidence in this case. It is clearly a matter which may be of importance in other cases also. Your Lordships would, I think, regard it as undesirable that the burden should be imposed upon litigants in this class of case of adducing evidence of the character which in *Gaskill* v. *Gaskill* (27) Lord Birkenhead thought it expedient for the Attorney-General to ask for the

(21) [1921] P. 425.
(22) [1947] P. 103.
(23) [1949] P. 197.
(24) [1949] P. 331.
(25) [1921] P. 425.
(26) [1949] P. 197.
(27) [1921] P. 425.

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assistance of the court. That may be unavoidable where medical evidence in regard to the period is called by the respondent; there is nothing to prevent a case becoming the battleground of experts. But I am dealing with such a case as that out of which this appeal arises, in which the substantial issue between the parties was whether the husband had at what was considered the relevant times any opportunity of intercourse with his wife and no question of an abnormal period of gestation had been raised until the trial and then only by the commissioner himself.

[His Lordship set out the evidence of Dr. William Glyn Evans and continued:—] The question, as I see it, is whether the court ought to accept this evidence as adequate to justify a finding that beyond all reasonable doubt the child was not the child of the husband. I have no hesitation in answering this question in the affirmative. I do not say that the onus probandi shifts because the period is not a "normal" one, but I think that the onus is a light one and is easily discharged when the period diverges largely from the normal. Here the court had the advantage of hearing a medical practitioner whose training and everyday working practice must have made him familiar with the ordinary problems of gestation and birth. He had, as he said, not studied the problem of the "maximum period from the time of sexual "intercourse to the time of the impregnation of the ovum", but it is sufficiently clear from his earlier answers that, while recognizing the possibility of some interval between coitus and fertilization, he regarded as impossible an interval which would defer the birth of a normal child to 360 days after coitus. That he was, I think, entitled to say as a matter of competent medical opinion without having made a special study of the subject. In these circumstances the learned commissioner was not, I think, justified in disregarding his evidence. He was, as I have said, entitled as a matter of judicial knowledge to know that, just as there is a "normal" period of gestation, so there are "abnormal" cases. But he was not entitled to set his own view of possible or probable abnormality, whether derived from the decided cases or from other sources, against the evidence that he heard. If indeed it had been legitimate for him to do so, I do not understand how he could disregard the evidence given by Sir Eardley Holland in *M-T.* v. *M-T.* (28).

In my opinion, therefore, the commissioner, having found the facts as I have already stated them, should have acted upon the

(28) [1949] P. 331.

medical evidence that was given in the case and made a decree for divorce. I move your Lordships that the appeal of the husband be allowed, the cross-appeal of the wife dismissed and the cause be remitted to the High Court in order that the proper decree may be made.

LORD NORMAND. My Lords, this is an action of divorce on the ground of adultery. The husband is the petitioner. There has already been one retrial and the Court of Appeal has by a majority ordered a second retrial. Against this order the appellant has appealed and the respondent has cross-appealed. Both parties are anxious to avoid a second retrial, the appellant maintaining that on the evidence he is entitled to a decree nisi of dissolution of the marriage, and the respondent maintaining that the judgment of the commissioner dismissing the action should be restored. Denning, L.J., dissented in the Court of Appeal and was prepared to grant a decree nisi. The majority, Bucknill and Asquith, L.JJ., would have been in favour of granting a decree but found it difficult to do so because certain letters written by the respondent, from which an inference unfavourable to her might be drawn, had been read to the commissioner without the respondent's having had an opportunity of explaining them. The reason for that was that counsel were restrained from putting questions lest they should be thought to infringe the rule laid down in *Russell* v. *Russell* (29). Bucknill and Asquith, L.JJ., were, I think, influenced in favour of ordering a new trial by the expectation that the rule would be abrogated by legislation before a new trial could take place. I respectfully agree with the Court of Appeal that it would be unjust to the respondent to allow these letters to be used against her. But if it is possible without injustice to either party to arrive at a decision of the case upon the other evidence, leaving the letters altogether out of account, that is the course which ought to be taken. For a second retrial would be a hardship both for the appellant and for the respondent, and it might work injustice because the lapse of time since the events to be investigated might result in loss of evidence.

The salient facts are simple. On August 13, 1946, the respondent gave birth without prolonged or difficult labour to a normal full term child weighing 8¼ pounds. The commissioner was satisfied beyond reasonable doubt that the appellant was abroad from August 17, 1945, till February 9, 1946, and that the

(29) [1924] A. C. 687.

respondent was throughout that period resident in this country. There is no evidence against the respondent of any suspicious relations with any other man or of any looseness of conduct or that she was anything but a respectable and hard-working woman.

The submission for the appellant is that the child, born on August 13, 1946, must have been conceived in adultery. His counsel relied on the child's weight and development at birth, the date of birth 360 days after the appellant's departure from this country in August, 1945, and six months after his return, and the evidence of Dr. Evans, a general practitioner who examined the child on October 12, 1946. He relied also on the way in which the defence had been conducted. The last matter may be conveniently dealt with at this stage.

The respondent at the trial adduced certain witnesses to speak to a visit paid to her by the appellant in the late autumn of 1945. The dates given by the witnesses are vague but there can be no doubt that the purpose in adducing them was to show that the appellant and the respondent were or might have been together at a date which would naturally account for the child's birth on August 13, 1946. This evidence was disbelieved by the commissioner. It was said also that the case had been conducted by the respondent on the footing that the only question was whether the respondent and the appellant might have been together in October or November, 1945. This is, however, a point on which the recollection of counsel to some extent differed and I would therefore disregard it.

In divorce proceedings it is for the petitioner to prove his case whether the action is defended or not, and though the putting forward of a false defence may destroy the respondent's credibility that in itself does not establish the truth of the petitioner's case. Apart from that objection of principle, it would in the circumstances of this case be unjust to the respondent to infer or assume that the false defence is tantamount to an admission of guilt. If it is possible that a child may be born 360 days after coitus and if that was what had indeed happened, the departure from the normal course of things is so extraordinary that the mother, conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication or worse.

If it is proper to exclude the letters written by the respondent and the way in which the case was conducted, there remains the evidence of the dates of birth and of the appellant's absence and the evidence of Dr. Evans. My Lords, the possibility that a full term child born on August 13, 1946, could have been the fruit of a coitus which took place as late as February 9, 1946, may be disregarded. I do not think that evidence is required to prove that that is not possible, but if it is required it is given by Dr. Evans who says that the latest date of conception of this child according to the date of its birth and its weight was November 6, 1945. Accordingly, the only question is whether the child could be the result of a coitus which took place as early as August 17, 1945, or 360 days before birth.

If the only period to be considered were the period of gestation, I have myself no doubt that ordinary men and women would unhesitatingly say that a 360-days gestation is beyond the limits of what is possible, and a court of law could so decide without evidence. So far at least judicial knowledge may be allowed to reach. In this case Dr. Evans gave evidence in answer to a question put to him in examination in chief that the ultimate, by which he meant the earliest, date of conception was about October 23, 1945. If evidence were required, there it is.

But it appears from the cases cited by the commissioner and the Court of Appeal that the Divorce Court has in the present century entertained the question whether before impregnation there may not be a period during which the spermatozoa after insemination may maintain life in the female genital tract, and after an indefinite lapse of time enter the uterus and impregnate the ovum. This new aspect of the rule pater est quem nuptiæ demonstrant has given rise to great difficulties, which have hitherto been solved by evidence in each particular case. The evidence in other cases, of course, cannot competently be used in this case. But it is unsatisfactory to find that in one case (*Hadlum* v. *Hadlum* (30)) 349 days were found not to be too long and that in another case (*M-T.* v. *M-T.* (31)) in the same year 340 days were found to be excessive. This was the result of the differing evidence of medical men in the two cases. When doctors disagree the courts cannot claim such judicial knowledge about the viability of spermatozoa in the female body and the limit of time after which they would be unable to enter the uterus as would enable them to fix the precise time after coitus within which conception can take place and beyond which it cannot take place. In *Wood* v. *Wood* (32), Lord Merriman, P., said: "You

(30) [1949] P. 197.
(31) [1949] P. 331.
(32) [1947] P. 103, 106.

"can say that it is impossible to know where to draw the line; "yet you can say that one case or another must plainly be on "the wrong side of any line you can possibly draw". In *Williamson* v. *M'Clelland* (33), a filiation case, Lord President Dunedin said that in such a case he thought himself entitled to consider the possible duration of gestation "in the light of what "had been said by learned judges in other cases and of what one "knows to be the opinion of experts as disclosed in medical "books", and not to restrict himself to the evidence of the single medical witness in the case. I am satisfied that the Lord President would not have allowed himself this latitude in an action of divorce, for Scottish law has always allowed in filiation cases a latitude of probation, which it has not allowed even in ordinary actions.

His conclusion, however, is of interest in the present case for it deals with the issue of proof or disproof of paternity on general lines and agrees closely with the opinion of Lord Merriman. The Lord President said: "It is absolutely clear that "neither in law nor in medical science is it possible to fix an "actual number of days as the extreme period of gestation. In "certain systems of law the matter has been dealt with by "statute, and a limit has been arbitrarily fixed, but in our system "there is no such limit. That does not lead to the conclusion "that a period might not be submitted to the consideration of "the court of such length that the court would refuse to hold "that the parentage had been proved. The court is left free to "deal with each case as it occurs".

In another Scottish case, *Gray* v. *Gray* (34), Lord Blackburn thought that the onus should be on the defendant to prove that a gestation of 331 days was possible. It will be observed that in these two cases it was the period of gestation that was being considered; and so far as I am aware the Scottish courts have not specifically had to consider whether there might be a period between coitus and conception nor how long such a period might be.

I have felt great doubt whether the House ought not to say that, though it is not possible to draw the line at an actual number of days, 360 days is too long a period, unless evidence of medical knowledge is adduced by the respondent to show the contrary. We have, however, the testimony of Dr. Evans and it is, in my judgment, sufficient for the disposal of the case. I can

(33) 1913 S. C. 678, 680.

(34) (1919) 1 S. L. T. 163.

deal with it briefly because it has already been analysed by my noble and learned friend on the woolsack. The doctor said that the spermatozoa could not live in the vagina for more than a few days and still be able to enter the uterus. In answer to a further question he said that he was not able to say what was the maximum period which might elapse between coitus and impregnation because he had never studied that aspect. Because he gave this answer the commissioner treated his evidence as valueless and indicated that he would not be satisfied by anything short of the evidence of an " academic specialist ". I think that the commissioner has misunderstood Dr. Evans. A medical man may not know what the maximum period may be and yet be able to say that according to existing medical knowledge and belief it cannot be more than a few days. That, I think, is the effect of Dr. Evans' testimony.

In the Court of Appeal, Bucknill, L.J., said (35): " Surely the " practical experience of a general medical practitioner is likely " to give him a valuable working knowledge of what is normal in " such cases, and if he has never known of a case where spermatozoa remained alive and fertile in the female for over two " months before fertilizing the ovum, such an absence of " experience has a definite practical value ". This observation of the Lord Justice is, if anything, an understatement of the effect of the authorities. In *Gaskill* v. *Gaskill* (36), Lord Birkenhead, L.C., stated the principle on which a judge should act in coming to a conclusion of fact upon the possible duration of the period between coitus and birth. He had considered first the relevant authorities and in particular the opinion of the judges in the *Banbury Peerage* case (37) and the judgment of Lord Lyndhurst, L.C. (38), in *Morris* v. *Davies* (39), from which he made extensive citations which it is needless to repeat. He summed up the result thus (40): " I can only find her guilty if I come " to the conclusion that it is impossible, having regard to the " present state of medical knowledge and belief, that the " petitioner can be the father of the child ". The existing state of medical science and belief is the standard which has been since applied. In *M-T.* v. *M-T.* (41) the evidence of the medical witness spoke of what happens " as a rule " and " normally "

(35) 65 T. L. R. 620, 622.
(36) [1921] P. 425.
(37) (1811) Le Marchant's *Gardner Peerage Case*, 389, 437–9.
(38) When sitting in the Court of Chancery.
(39) (1837) 5 Cl. & F. 163, 215.
(40) [1921] P. 425, 434.
(41) [1949] P. 331, 333.

and of the absence of his knowledge of any case in which so long a period as twenty-one days had elapsed between coitus and impregnation. That evidence rightly, in my opinion, satisfied the learned judge who tried the case.

In the present case the commissioner, if he had proceeded upon the evidence and not upon his own speculations of what may be possible, and if he had not misdirected himself that he should not be satisfied without the evidence of a scientist, could not reasonably have arrived at any other conclusion than that the child was not the child of the appellant.

There can be no suggestion that the respondent's case has been prejudiced by excluding from consideration the letters written by her or the false defence put forward by her. There can, therefore, be no injustice to her on that score in granting a decree nisi. I am for allowing the appeal and granting to the appellant the remedy for which he petitions.

LORD OAKSEY. My Lords, the respondent in this appeal has twice been successful in the courts of first instance and now for the first time she is by your Lordship's House to be found guilty of adultery and her child is in effect to be bastardized. She is a wife against whose marital conduct nothing has been said or suggested except that her child was born 360 days after her husband had access to her. In such circumstances the law, as I understand it, has always been that the onus upon the husband in a divorce petition for adultery is as heavy as the onus which rests upon the prosecution in criminal cases. That onus is generally described as being a duty to prove guilt beyond reasonable doubt but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded. The principle upon which this rule of proof depends is that it is better that many criminals should be acquitted than that one innocent person should be convicted. But the onus in such a case as the present is not founded solely upon such considerations but upon the interest of the child and the interest of the State in matters of legitimacy, since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child: see *Russell* v. *Russell* (42).

This appeal not only involves the application of the rule of proof in such a case as the present; it also involves difficult

(42) [1924] A. C. 687.

questions as to the facts of which the court should take judicial notice. The cases to which reference has already been made have decided that the birth of a child many days after the normal period of gestation and up to as many as 349 days after access of the husband did not prove adultery.

It is important, I think, to consider carefully what taking judicial notice of facts means. It cannot, in my opinion, mean assuming the truth of a fact in issue, for that would be to beg the question. Doubtless there are some facts almost universally accepted of which, if not denied and put in issue, the court can take judicial notice, but it is essential to be certain of the fact of which you assume the truth. As the noble Lord on the woolsack has pointed out, to take judicial notice of the fact that the normal period of gestation is 270 or 280 days, apart from its own vagueness, affords little or no assistance when the question is what is the greatest abnormal period of gestation. In one sense the court takes judicial notice of the decisions in other cases but it does not, unless bound by the decisions, assume their correctness. As to the evidence given and the facts found therein the court no doubt takes notice of the fact that the evidence was given and certain facts were found, but not in the strict sense of taking judicial notice or assuming that they are correct. In the present case it was the main question in issue whether the respondent's child was the result of an abnormal period between coitus and birth and the court could not, in my opinion, assume judicial knowledge of the length of that period, nor is your Lordships' House bound by the decisions in the cases cited upon the possible length of that period. On the other hand, it seems to me that great weight must be attached to the decision of Lord Birkenhead in *Gaskill* v. *Gaskill* (43), proceeding as it did upon medical evidence specially called by the Attorney-General. Denning, L.J., in the Court of Appeal took judicial notice of other matters which he described (44) as the facts of nature, which appear to me to conflict with these decisions and of which I at any rate have no knowledge.

In my opinion it is necessary, as Lord Birkenhead held, for a husband or the court in such a petition as the present to call medical evidence that the child could not, according to the medical opinion of the day, be the child of the husband. The question is, therefore, whether such evidence was called in this case. The evidence of Dr. Evans did not satisfy the commissioner

(43) [1921] P. 425.

(44) 65 T. L. R. 620, 623.

and I must say does not satisfy me. Even in a criminal case, apart altogether from any question of legitimacy, if such evidence had been given in a case entirely dependent upon medical considerations, I should not have allowed the case to go to the jury.

The question in this case and the question in the cases above referred to was whether there are abnormal cases in which birth may take place many days beyond the ordinary period of gestation, either because spermatozoa can live after coitus and before conception or for other unspecified reasons. It is a question of medical science on which I imagine much must have been written and many opinions held by the most eminent medical authorities. Yet Dr. Evans does not refer to any authorities and when asked "What is the maximum period in your view from the time of "sexual intercourse to the time of the impregnation of the "ovum?" he answers, "I cannot give an opinion on that, my "Lord. I should think a few hours; but I have never studied "that aspect, my Lord". Now that aspect was in this case, as it must have been in the other cases in which a period of 331 days to 349 days between coitus and birth was in question, the crucial aspect of the matter, and to hold that such evidence discharges the onus which rests upon the prosecution in criminal cases or upon any party who seeks to prove illegitimacy is, in my respectful opinion, to depart altogether from the practice in such cases. If a man wishes to divorce his wife and to stigmatize with bastardy her child born during their marriage it seems to me a small thing to require that he should call a medical witness who has an opinion on the main question at issue. Such cases as this do not arise every day and if there were any case of real hardship from the point of view of expense I think the court should call expert evidence, as Lord Birkenhead did. But in the present case, the petitioner having already failed at two hearings, I am in favour of allowing the cross-appeal and dismissing his petition.

LORD MORTON OF HENRYTON. My Lords, in my view the commissioner ought to have granted to the appellant a decree nisi for the dissolution of his marriage on the ground of the adultery of the respondent with a man unknown.

The appellant called evidence which satisfied the commissioner that the appellant was not in this country between August 18, 1945, and February 8, 1946. He also called the midwife who attended the respondent when she gave birth to a male child at 8.15 a.m. on August 13, 1946. The commissioner clearly accepted

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the uncontradicted evidence of the midwife that the child was a full-time child weighing 8 lbs. 4 oz., that the child was a normal one and that there was no question of the child being "forced "into the world". He was satisfied that the child could not have been the result of intercourse between the petitioner and the respondent in February, 1946.

There remained only two possibilities—that the child was the result of intercourse between the appellant and the respondent 360 days before his birth, or that the respondent committed adultery during her husband's absence from this country.

In addition to the evidence just mentioned, the appellant called Dr. Evans, whose evidence has already been set out by my noble and learned friend on the woolsack. Apart from formal questions as to her name and address, the respondent was asked only one question by her counsel, "Have you ever committed "adultery?", and she answered, "No, Sir". Three witnesses were called on her behalf, her mother, her sister and a Mr. Mulhern, and they gave evidence to the effect that the appellant was home on leave between August and Christmas, 1945. The commissioner did not believe the evidence of these three witnesses.

My Lords, what was the burden of proof upon the appellant, and did he discharge it by the evidence to which I have briefly referred? Section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, in the form which it now takes by reason of s. 4 of the Matrimonial Causes Act, 1937, provides, so far as material, that: "(1) On a petition for divorce it shall be the duty "of the court to inquire, so far as it reasonably can, into the facts "alleged and whether there has been any connivance or condona-"tion on the part of the petitioner and whether any collusion "exists between the parties and also to inquire into any counter-"charge which is made against the petitioner. (2) If the court "is satisfied on the evidence that—(i) the case for the petition "has been proved . . . the court shall pronounce a decree of "divorce . . .".

In *Ginesi* v. *Ginesi* (45) the Court of Appeal, after a survey of the authorities, held that a petitioner must prove adultery "beyond reasonable doubt". In my view the burden of proof is certainly no heavier than this, and counsel for the appellant did not contend that it was any lighter. Assuming that this burden lay upon the appellant, did he discharge it?

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(45) [1948] P. 179.

My Lords, the appellant proved that the birth took place 360 days after the end of his leave in August, 1945, and that the birth was a normal one. If one adds to this the evidence of Dr. Evans, I am of opinion that the appellant amply discharged the burden of proof upon him. I would add that the commissioner did not say that he believed the wife's statement that she had never committed adultery; he dismissed the petition because, as he said: " I am not satisfied beyond a reasonable doubt that " adultery has been committed ". I think that he applied the right test, but that he ought to have been so satisfied.

Certain letters written by the respondent were read to the commissioner and were considered by the Court of Appeal. Bucknill, L.J., said (46): " [They] seem to me to be adverse to her " credibility and tend to prove that her husband was not the " father of the child ". I see no reason to differ from this observation, but I have entirely disregarded these letters in forming my conclusion in this case, as your Lordships have heard no argument as to whether they were or were not admissible in evidence. Sir Godfrey Russell Vick, for the appellant, was content to submit that the case was proved without them.

So much for the case now before your Lordships' House, but I go further, in the hope that my views may meet with your Lordships' approval and may be of assistance in other cases. In my opinion the court is entitled to take judicial notice of the fact that the normal period from fruitful coitus to birth does not exceed 280 days. That is one of the ordinary facts of nature as to which no evidence is required. If a husband proves that a child has been born 360 days after he last had an opportunity of intercourse with his wife, and that the birth was a normal one, and if no expert evidence is called by either side, I am of opinion that the husband has proved his case beyond reasonable doubt.

As to the possible period of time between coitus and conception, to which the commissioner attached so much importance, if evidence is given, in any case hereafter, that this period may be substantial, it will of course be duly taken into account by the judge before whom it is given. In the present case I cannot find that any evidence was given which should have raised any reasonable doubt in the mind of the commissioner. And if it had been legitimate for him to consider the latest medical evidence in any reported case, the evidence of Sir Eardley Holland, a past President of the Royal College of Obstetricians and Gynæcologists

(46) 65 T. L. R. 620, 623.

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and consulting gynæcologist to the London Hospital, is to be found in *M-T.* v. *M-T.* (47). Sir Eardley said, inter alia, that the spermatozoa did not as a rule remain capable of effecting fertilization for more than two or three days after being deposited in the female genital tract. Fertilization normally took place at the time of insemination, that is, of coitus, and he had never heard of an authentic case of an interval of fourteen days between coitus and fertilization, which had been referred to in the evidence given in *Hadlum* v. *Hadlum* (48). Sir Eardley's evidence certainly gives no support to the theory that an interval of 360 days between coitus and birth is even a remote possibility.

The burden of proving adultery is, of course, on the petitioner, but there must surely come a time when a husband is entitled to say: "Having regard to the ordinary course of nature, and to "the interval between intercourse and birth, there is no reasonable doubt that my wife has committed adultery. It is for "her to raise a reasonable doubt, if she can, by calling expert "evidence". I am glad to note that this view coincides with the view expressed by Lord Blackburn in the Scottish case of *Gray* v. *Gray* (49).

It may be said: "If 360 days is enough, why not 350, 340, "330 or 320 days or less?" For my part I think that, in the absence of any expert evidence on either side, an interval of 320 days should be enough to satisfy the court. I select that particular interval because I think that forty days beyond the upper limit of the normal period puts the matter beyond reasonable doubt if the birth is proved to be a normal one and no further evidence is offered on either side. Evidence of loose conduct on the part of the wife might well lead a court to regard a shorter interval, coupled with such evidence, as proving adultery beyond reasonable doubt.

There are, however, cases in which a longer interval than 320 days has been held insufficient to prove adultery. In *Gaskill* v. *Gaskill* (50) the interval was 331 days. Lord Birkenhead, L.C., who tried the case sitting as a judge of first instance, said, in regard to the wife (51): "I can only find her guilty if I come to "the conclusion that it is impossible, having regard to the present "state of medical knowledge and belief, that the petitioner "can be the father of the child. The expert evidence renders "it manifest that there is no such impossibility. In these

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(47) [1949] P. 331, 332–4.

(48) [1949] P. 197.

(49) 1 S. L. T. 164.

(50) [1921] P. 425.

(51) Ibid. 434.

"circumstances I accept the evidence of the respondent, and find "that she has not committed adultery, and accordingly I dismiss "the petition".

My Lords, in the case of *Gaskill* v. *Gaskill* (50) the birth was far from being a normal one, but I think that Lord Birkenhead placed too heavy a burden of proof upon the husband. It is not the law to-day, in my view, and with all respect to Lord Birkenhead I do not think it was the law in 1921, that a husband is bound to prove that he cannot possibly be the father of the child; and I do not think that the case of *Morris* v. *Davies* (52), cited by Lord Birkenhead, established the strict rule which he laid down. In *Wood* v. *Wood* (53) the interval between cohabitation and birth was 346 days, and in *Hadlum* v. *Hadlum* (54) it was 349 days. In each of these cases the court refused the husband a decree, and I gather that in each case the court took the view that the husband must prove that he could not possibly have been the father of the child. In *M-T.* v. *M-T.* (55) Ormerod, J., had to try an issue as to the paternity of a child born 340 days after the husband had gone overseas. Medical evidence was given which satisfied the learned judge that the husband could not have been the father of the child. The learned judge said nothing as to the burden of proof, and I think that his decision was beyond criticism.

My Lords, I have already stated my view as to the position when no expert evidence is given on either side. When such evidence is given it must, of course, be weighed with care in order to ascertain whether the husband has proved his case beyond reasonable doubt. But I think that the cases of *Gaskill* (50), *Wood* (53) and *Hadlum* (54) put an unwarranted and increasing burden upon a husband who seeks to prove his wife's adultery. If these decisions were right, a husband would have to incur the expense of calling expert medical evidence in every case in which a child was born to his wife ten months or more after he last had intercourse with her. And, even if he did call such evidence, absolute impossibility is a matter which is almost, if not quite, incapable of proof.

I agree with the motion proposed from the woolsack.

LORD MACDERMOTT. My Lords, I do not find anything to further the husband's appeal either in the letters written by the wife or in the manner in which her case was conducted at the retrial. Excluding these matters and excluding also, as one must on the undisputed findings of the learned commissioner, any possibility of the husband having had access to his wife between August 17, 1945, and February 9, 1946, or of the child being conceived on or after the latter date, the evidence relevant to the appeal and cross-appeal is confined to—(a) that establishing the fact that the wife was delivered of a normal full-term child, without unusual difficulty, on August 13, 1946, or 360 days after the last relevant opportunity of intercourse with her husband; (b) the medical testimony adduced by the husband; and (c) the wife's denial of adultery.

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(50) [1921] P. 425.
(52) 5 Cl. & F. 163.
(53) [1947] P. 103.
(54) [1949] P. 197.
(55) [1949] P. 331.

The duty of the court, on hearing a petition for divorce is, in so far as material, to pronounce a decree if "satisfied on the "evidence" that the case for the petition has been proved, and to dismiss the petition if not so satisfied: see s. 178, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937. The standard of proof to be observed by the court in exercising this jurisdiction was the subject of controversy in the present case. For the husband it was argued that the adultery alleged had to be proved beyond reasonable doubt. For the wife, on the other hand, it was submitted that, as the result of a finding of adultery would, in effect, be to bastardize the child, the petitioner, in order to succeed, would have to go further and show that it was impossible for him to be the father. This, in my opinion, is putting the onus too high. Though Lord Birkenhead, L.C., in *Gaskill* v. *Gaskill* (56) said, "I can only find her guilty if I "come to the conclusion that it is impossible, having regard to "the present state of medical knowledge and belief, that the "petitioner can be the father of the child", I do not think he intended to set up the proposition advanced here on behalf of the wife by Mr. Middleton. Lord Birkenhead had previously indicated (57) his unqualified acceptance of the views expressed by Lord Lyndhurst, L.C. (58), in *Morris* v. *Davies* (59), and I do not find in that case or in the *Banbury Peerage* case (60), also referred to by Lord Birkenhead, warrant for Mr. Middleton's contention.

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(56) [1921] P. 425, 434.

(57) Ibid. 434.

(58) When sitting in the Court of Chancery.

(59) 5 Cl. & F. 163, 215.

(60) (1811) Le Marchant's *Gardner Peerage Case*, 389, 437–9.

The evidence must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Lord Stowell, when Sir William Scott, described in *Loveden* v. *Loveden* (61) as "the guarded discretion of a "reasonable and just man"; but these desiderata appear to me entirely consistent with the acceptance of proof beyond reasonable doubt as the standard required. Such, in my opinion, is the standard required by the statute. If a judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied upon by a petitioner as ground for divorce, he must surely be "satisfied" within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child. On the other hand, I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word "satisfied" is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied", in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt* v. *Moncreiffe* (62), that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

The next question is whether the commissioner should have been satisfied, on the material to which I have referred, that the wife had committed adultery. My Lords, I agree that he should. To get to the real issue it will be convenient to refer first to several connected matters in order to get them out of the way. The commissioner applied the correct standard of proof and kept it before him throughout. He also kept in mind that the wife had denied on oath that she had committed adultery. But he does not say that he accepted her denial and I think it is clear from his judgment that the doubts which led him to dismiss the petition arose on the petitioner's case and that, had it been fortified with the expert testimony which the commissioner found lacking, he would not have regarded the denial as sufficient to prevail against it. Further, it is plain that the commissioner was satisfied that the period of actual gestation was normal. This, and what was for him the real point of difficulty, are indicated clearly in the passage in his judgment where he says: "I have "no reasonable doubt that the ovum from which that child was "produced was impregnated somewhere about the normal period "before that child was born. The doubt in my mind is as to the "period which is the longest period that is practicable between "the time of coitus and the time of impregnation of the ovum; "and that is a scientific question".

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(61) (1810) 2 Hag. Con. 1, 3.

(62) (1874) L. R. 2 Sc. & D. 374.

My Lords, had Dr. Evans, the petitioner's medical witness, sworn that he had made a scientific study of that particular question and that the period between a fruitful coition and the resulting conception must, at longest, be a matter of weeks and not of months, then, as I understand his judgment, the commissioner would have been relieved of his doubt and would have given a decree, for the interval running from August 17, 1945, to the date of conception was one of between two and three months on any reckoning. Dr. Evans, however, did not speak in those terms and it is obvious that the commissioner did not regard his testimony of value on the point that was troubling him. As he says in his judgment: "I do not know how long spermatozoa "will remain alive in the tucks and crannies of the female genital "tract. I have got no medical evidence on the subject".

For the husband, Sir Godfrey Russell Vick challenged the ruling of the commissioner on two main grounds. First, he said that the evidence of Dr. Evans (who admittedly is a competent general practitioner and a credible witness) proved enough to preclude any reasonable doubt on the point on which the petitioner's case foundered. And, secondly, he submitted that what he contended was the impossibility of a normal child being born 360 days after coition was a fact of which judicial notice ought to be taken.

My Lords, after a careful consideration of Dr. Evans' testimony I am satisfied that the first of these contentions is sound. Dr. Evans gave the probable date of conception as on or about November 6, 1945, and was not asked anything by counsel, either in his examination-in-chief or on cross-examination, as to an interval between connexion and fertilization. His answers on that subject were made to questions asked by the commissioner. This part of the evidence I need not repeat. It has already been set out in the opinion just delivered by my noble and learned friend on the woolsack which I have had the advantage of reading in print. I entirely agree with what he has said regarding the substance and effect of this testimony and, in particular, its adequacy, in the circumstances of this case, as proof beyond reasonable doubt that the husband was not the father of the child. I would only add two observations. One is that I find nothing in the authorities to suggest that, in the present state of knowledge on this particular matter, the final and convincing word must necessarily be that of " an academic specialist "—the term used by the commissioner—to the exclusion of medical evidence based on practical experience and the learning and literature of the profession on the subject. The other is that Dr. Evans' last answer—that in which he replied with a diffident " I should think a few hours " when asked as to the maximum interval between intercourse and impregnation—has to be read with his earlier answers; and from those I take it to have been his definite opinion that spermatozoa would not live long in the genital tract on account of its secretions, and that if they survived for as much as three weeks they would be very unlikely ever to get into the uterus. The result, in my opinion, must be that, even if one were to discard the witness's " few hours " as hesitant, the maximum period that could be substituted therefor would, at most, be one of weeks and not months.

As this conclusion is enough to dispose of the appeal and cross-appeal I do not propose to deal at length with the second and, as it seems to me, more difficult submission advanced on behalf of the husband. Apart from the medical evidence altogether, was his case proved beyond reasonable doubt by the normal delivery of a normal child 360 days after the relevant coition? There is no doubt that judicial notice will be taken of the fact that, in the ordinary course of nature, delivery occurs in or about nine months after fruitful intercourse. And it is, I think, no less clear that judicial notice will also be taken of the fact that the normal period is not always followed in nature and that the actual period may on occasion be considerably less or considerably more. But the law of this country has not fixed limits of deviation from the normal period in the sense that more than a certain period or less than a certain period is to be deemed impossible, or impossible until the contrary is proved. The question which then arises—I refer from now on only to periods longer than the normal—is

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whether the court, without instruction on the matter, may ever regard an abnormally long period as impossible and, if so, at what point of time this may be done.

My Lords, I do not think it open to doubt that a time must come when, with the period far in excess of the normal, the court may properly regard its length as proving the wife's adultery beyond reasonable doubt, and decree accordingly. But, as has so often been pointed out, the difficulty is to know where to draw the line. The reported cases naturally tend to creep up on each other and there is little sound guidance to be gleaned from authority. If a line has to be drawn I think it should be drawn so as to allow an ample and generous margin, for it may be as difficult for the wife to prove a freak of nature as for anyone else; and it need hardly be added that, before acting on the length of the period, due regard must be paid to any other relevant evidence. But I do not find it possible to go further and lay down any hard and fast rule capable of general application. In my opinion there is nothing in the testimony here, or in the facts of which judicial notice may be taken, to justify fixing a specific period and holding that, in the absence of evidence to the contrary, anything more would, but anything less would not, prove adultery beyond reasonable doubt. If, in the light of a full and exhaustive inquiry, the line could be thus fixed it might well be that the period of 360 days would come near or even cross it. But, however that may be, I am not prepared to decide this case merely on the fact that a period of that duration has been established. I prefer to relate my conclusion to the evidence as a whole and, for the reasons already given, I think it should have satisfied the learned commissioner beyond reasonable doubt.

I would therefore allow the appeal and dismiss the cross-appeal.

Appeal allowed.

Solicitors: *Edward Mackie & Co.; Jaques & Co., for Cyril Jones, Son & Williams, Wrexham.*

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Nov. 13,
14, 15;
Dec. 14.

INLAND REVENUE COMMISSIONERS . APPELLANTS;
AND
BARCLAYS BANK LD. AND ANOTHER . . RESPONDENTS.

SAME . . . . APPELLANTS;
AND
LATILLA-CAMPBELL . . . . . RESPONDENT.

SAME . . . . APPELLANTS;
AND
MAYO . . . . RESPONDENT.

Revenue — Surtax — Direction that company's income be treated as members' income—Apportionment to member—Married woman living with husband—Assessment to surtax in respect of income so treated—Assessment made on husband of member—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *General Rules Applicable to All Schedules, r.* 16—*Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-s.* 1.

A husband living with his wife is, by virtue of r. 16, proviso 1, of the All Schedules Rules of the Income Tax Act, 1918, liable to pay surtax in respect of undistributed income of a company notionally attributed to his wife as a member of the company under the terms of s. 21 of the Finance Act, 1922, notwithstanding that these terms are on their face confined to members of the company and that the husband himself is not such a member.

Decision of the Court of Appeal reversed.

APPEALS from the Court of Appeal (Tucker, Singleton and Jenkins, L.JJ.).

The appeals were from orders of the Court of Appeal dated July 27, 1949, allowing appeals by the late H. G. Latilla, Edmund G. Latilla-Campbell and Eric S. Mayo from orders of the King's Bench Division (Atkinson, J.) whereby appeals by them by way of case stated from a determination of the Commissioners for the Special Purposes of the Income Tax Acts given in 1945 were dismissed and the determination was affirmed. The appeals all raised the same question, namely, whether each of the appellants, as a husband living with his wife, was liable to pay surtax in respect of undistributed income of a company notionally attributed to his wife as a member of the company, under s. 21 of the Finance Act, 1922. The Court of Appeal answered this question in the negative. H. G. Latilla died soon after their decision. His executors were Barclays Bank Ld. and his widow, Mrs. Edith Latilla. In the appeals to the House of Lords they were substituted for him as parties. The facts are fully set out in the opinion of Lord MacDermott.

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

Sir Andrew Clark, K.C., J. H. Stamp and *R. P. Hills* for the Crown.

Grant, K.C., Graham-Dixon, K.C., and *Creese* for the respondent taxpayers.

The arguments sufficiently appear from the opinions of their Lordships.

Their Lordships took time for consideration.

December 14. LORD SIMONDS. My Lords, finding myself unable to uphold the decision of the Court of Appeal in these cases, I was prepared to give my own reasons for taking a different view of the complicated provisions of the various Acts which we have had to consider; but, having had the advantage of reading the opinion which my noble and learned friend Lord MacDermott is about to deliver, I shall content myself with saying that I am in full agreement with his reasoning and conclusions and cannot usefully add anything on my own behalf. I move that the appeals be allowed and that the order of Atkinson, J., affirming the determination of the Commissioners for the Special Purposes of the Income Tax Acts be restored, and that the respondents do pay the costs of the appellants in this House and the Court of Appeal.

LORD NORMAND. My Lords, were it not that we are differing from the Court of Appeal, I would content myself with expressing my full concurrence with my noble and learned friend Lord MacDermott, whose opinion I have had the advantage of reading in print. As it is, I shall detain your Lordships as briefly as may be with a statement of my reasons for concluding that the appeal should be allowed. I shall find it necessary for this purpose to refer to the Income Tax Act, 1918, the Finance Act, 1922, s. 21, and the Finance Act, 1936, s. 19, sub-s. 5, but it is not necessary for me to consider the earlier legislation or to refer to the Finance Act, 1927, which substituted surtax for super-tax and applied to surtax the provisions applicable to super-tax.

Rule 16 of the Income Tax Act, 1918, is an income-tax rule applicable to all schedules and it is universally applicable for the purposes of income tax unless an application is made under r. 17 for the separate assessment of the income of husband and wife. Rule 16 enacts that " a married woman . . . being entitled to " any . . . profits to her separate use, shall be assessable and " chargeable to tax as if she were sole and unmarried ". I pause there to say that " profit " is equivalent to income and that " chargeable " in that context includes liability to pay. But there are attached to the enactment two provisoes of which the first alone is relevant. It provides that " the profits of a married " woman living with her husband shall be deemed the profits of " the husband, and shall be assessed and charged in his name " and not in her name or the name of her trustee ". The effect as matter of construction seems to me clear: the profits of a married woman living with her husband instead of being assessed on her as they would have been under the enacting part of the rule shall be assessed in her husband's name; instead of being chargeable on her as they would have been under the enacting part of the rule shall be charged, which must mean charged to tax, in her husband's name, with the effect that instead of being exigible from her as it would have been under the principal enactment the tax will be exigible from her husband. The proviso, it must be noted, overrides other provisions in the schedules by which the tax is charged on a person under a particular description. I shall give only one example. Under Sch. E the tax is charged on every person exercising certain offices of profit. If a married woman living with her husband exercises one of these offices, the tax is, in spite of the express terms of Sch. E, charged upon her husband and it is from him that it is exigible. Another effect of the proviso is that a statement of total income under s. 27, sub-s. 1, is made by the husband and includes as part of his income the income of his wife if living with him.

I turn now to the super-tax provisions of the Income Tax Act, 1918. It is an additional duty of income tax on the income of individuals in excess of a certain amount. Therefore the total income of the individual is the basis for it and the individual must furnish a statement of his total income (s. 5, sub-s. 1, and s. 7, sub-ss. 2 and 3). All the provisions of the Act relating to persons who are to be chargeable with income tax and to income tax assessments and to the collection and recovery of income tax are made applicable to super-tax. Rule 16 is thus made applicable in its entirety to super-tax, so that the husband has to include in his statement of his total income the income of his wife living with him, and he has to pay the super-tax on this total income. The wife makes no return and pays no part of the tax. Her income is aggregated with her husband's, because the proviso to r. 16 overrides the word " individual ".

Section 21 of the Finance Act, 1922, deals with a notional income. Under sub-s. 1, when a direction is made, the income of the company shall for the specified year be deemed to be the income of the members and the amount thereof shall be apportioned among them. Furthermore, the member shall for the purposes of the tax be deemed to have received the amount apportioned to him (Sch. I, para. 9) and it shall be included in the statement of his total income or in any amended statement of his total income, and it shall be deemed to be the highest part of that income (Sch. I, para. 8). Section 21, sub-s. 2, requires that super-tax chargeable under the section in respect of the amount of the company's income apportioned to a member " shall be assessed upon that member in the name of the " company, and, subject as hereinafter provided, shall be payable by the company ". It also provides that " all the provisions of the Income Tax Acts . . . relating to super-tax " assessments and the collection and recovery of super-tax shall, " with any necessary modification, apply to super-tax assessments and to the collection and recovery of super-tax charged " under this section ". Rule 16 with its proviso is therefore ex figura verborum made part of the rules applicable to the assessment, collection and recovery of the super-tax charged under the section. But that does not greatly advance the Crown's case because the problem for decision lurks under the words " with " any necessary modification ". It is also important to note (s. 21, sub-s. 3) that the member is given an option to pay but the super-tax is not exigible from him, but only from the company, after service upon it of a notice of charge.

That was, however, changed by s. 19, sub-s. 5, of the Finance Act, 1936. The sub-section provides that when a notice of charge has been served on a company or its liquidator under s. 21, sub-s. 3, of the Act of 1922 and the tax has not been paid by the company before a certain period the tax shall thereupon, without prejudice to the right to recover it from the company, be recoverable from the member on whom the tax was assessed.

My Lords, s. 19 of the Finance Act, 1936, is a series of amendments of s. 21 of the Act of 1922, and sub-s. 5 of s. 19 takes its place as a proviso added to sub-s. 3 of s. 21 of the Act of 1922 and has been from the date at which it came into operation within the outlook of the words "subject as hereinafter "provided" in sub-s. 2 of s. 21 of the Act of 1922.

When a married woman living with her husband is a member of a company which has been the subject of a direction under s. 21 of the Act of 1922, how far does proviso 1 to r. 16 apply? In my opinion it applies in its totality with slight modification. In the first place the apportioned income is profits of the wife. There is an express statutory enactment that it is to be deemed to be so and that she is to be deemed to have received it for the purpose of super-tax under s. 21. Secondly, the tax instead of being assessed on her as it would have been under the enacting part of r. 16 and under the provisions of s. 21, sub-s. 2, is to be assessed on her husband under the proviso to r. 16, but it is to be assessed in the company's name. Thirdly, instead of being chargeable on and payable by her as it would have been under the enacting part of r. 16, it is to be chargeable upon and payable by her husband, not, it is true, primo loco, but secondarily and conditionally on the company's failure to pay. There are, therefore, two modifications of r. 16. The first is that the proviso did not contemplate a charge upon the husband in any name but his own in respect of his wife's income, but as applied to super-tax under s. 21 of the Finance Act, 1922, the peculiar mode of assessment on the husband in the company's name is requisite.

Here no contradiction is involved. The effect of r. 16, proviso 1, is that it overrides the word "member", so that "shall "be assessed upon that member in the name of the company" must be read "shall be assessed upon the husband of that "member (if she is living with her husband) in the name of the "company". No more violence is done to the language than when the person who exercises an office is read as the husband of a person living with him as his wife who exercises an office. The second modification is that the proviso applies when the husband's obligation is subsidiary and conditional and not as formerly only when the sole and absolute obligant would under the principal enactment be the married woman and under the proviso be her husband. But with these modifications the proviso applies in its entirety.

It is an anomaly that the husband of a member and not the member herself should have power to affect the company's

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Same v. Latilla-Campbell.

Same v. Mayo.

Lord Normand.

liabilities by accepting or refusing the option to pay (s. 21, sub-s. 3). But anomalies are inevitable when the legislature is attempting to deal with the machinations of tax evasion.

I am not to be taken as suggesting that, before the passing of the Act of 1936, r. 16, proviso 1, did not apply to income deemed under s. 21 of the 1922 Act to be the income of a member who was a married woman living with her husband. I am inclined to think that it did apply to the effect that the total income under s. 22 was the total income returnable by the husband including the wife's actual income and her deemed income. But it is not necessary to decide that question in this case and, to avoid unnecessary complication and extension of the discussion, I have abstained and shall abstain from entering upon it or referring to further provisions of the relevant Acts which seem prima facie to support the view which I am inclined to favour.

I therefore agree with the motion proposed by my noble and learned friend on the woolsack.

Lord Oaksey. My Lords, I have come to the conclusion, after some hesitation and doubt, that this appeal ought to be allowed. It appears to me that it is possible to read s. 21 of the Finance Act, 1922, with r. 16 of the general rules applicable to Scheds. A, B, C, D and E of the Income Tax Act, 1918, in such a way that the sum apportioned to a married woman living with her husband who is a member of a company to which s. 21 applies shall be assessed on her husband for the purposes of super-tax.

Section 21, sub-s. 1, provides that such a sum shall for super-tax purposes be deemed to be the income of the married woman, and s. 21, sub-s. 2, provides that all the provisions of the Income Tax Acts and any regulations made thereunder relating to super-tax assessments shall with any necessary modification apply to super-tax assessments under the section. Rule 16 is one of such regulations and if it is applied to the super-tax assessment of a married woman living with her husband under s. 21, it seems to me to be a proper and necessary modification that for the purposes of super-tax the husband should be assessed in the name of the company instead of his wife. If this modification is not made there is a conflict between the provision of s. 21, sub-s. 2, that the assessment shall be on the wife who is the member of the company and the provision of r. 16 that the profits of a married woman living with her husband shall be assessed in the husband's name.

Further, I think it is necessary and proper to modify the provision in r. 16 that the profits shall be charged on the husband, since by the express terms of s. 21, sub-s. 3, they are charged on the company. If this construction is right r. 16 comes in for the purpose of assessment and aggregation for super-tax, but that part of his super-tax which is referable to the sum apportioned is chargeable to the company.

In my view s. 19, sub-s. 5, of the Finance Act, 1936, which provides that the tax shall be recoverable from the member on whom it was assessed if the company does not pay, neither helps nor harms the appellants. It is true the husband is not a member of the company but he has been assessed by virtue of the modification of r. 16 introduced by s. 21, sub-s. 2, of the Act of 1922 and this section makes him also chargeable if the company does not pay.

Mr. Grant, in his able argument for the respondent, contended that r. 16 only applies to profits of a married woman which satisfy three conditions: (1.) that she is entitled to such profits; (2.) that she would be assessable on them in her own name but for proviso 1; and (3.) that she would be liable to income tax on them but for proviso 1; and he said that, none of these conditions being satisfied, r. 16 could have no application. Whether or not these three conditions are conditions of the applicability of r. 16 in other cases, it appears to me that they are necessarily modified by s. 21 of the Act of 1922 which can only be harmonized with r. 16 by assessing the husband in respect of the income in question which is deemed to be his wife's by s. 21, sub-s. 1.

LORD MORTON OF HENRYTON. My Lords, in my view the Special Commissioners and Atkinson, J., were right in upholding the assessments made upon the respondents in these three appeals. I agree with the opinion which is about to be expressed by my noble and learned friend Lord MacDermott, but, as we are differing from the views of the Court of Appeal, I shall state my reasons shortly in my own words.

I think it is convenient, first, to endeavour to discover the true meaning and intent of s. 21 of the Finance Act, 1922, at the time of its enactment, and for this purpose to disregard, for the time being, any subsequent amendments in the section. Turning to sub-s. 1, I find that in the events there stated the Commissioners may, "by notice in writing to the company, direct that "for purposes of assessment to super-tax the said income of the "company shall, for the year or other period specified in the "notice, be deemed to be the income of the members, and the "amount thereof shall be apportioned among the members". With this sub-section should be read para. 9 of the first schedule to the Act of 1922, which provides that "the income apportioned "to a member of a company . . . under s. 21 of this Act shall, "for the purposes of super-tax, be deemed to have been received "by him at the date to which the accounts of the company for "the year or period were made up". The result so far is that the sums apportioned to Mrs. Latilla, Mrs. Mayo and Mrs. Latilla-Campbell respectively were deemed to be the income of these ladies respectively and were deemed to have been received by them.

I now turn to sub-s. 2, which is in the following terms: "Any "super-tax chargeable under this section in respect of the amount "of the income of the company apportioned to any member of "the company, shall be assessed upon that member in the name "of the company, and, subject as hereinafter provided, shall be "payable by the company, and all the provisions of the Income "Tax Acts and any regulations made thereunder relating to super-"tax assessments and the collection and recovery of super-tax "shall, with any necessary modification, apply to super-tax assess-"ments and to the collection and recovery of super-tax charged "under this section".

At this stage the vital question arises: is r. 16 of the All Schedules Rules in Sch. I to the Income Tax Act, 1918 (hereafter referred to, for the sake of brevity, as "r. 16") one of the provisions which, by the latter part of this sub-section, are made applicable "to super-tax assessments and to the collection and "recovery of super-tax charged under this section"? In order to ascertain what are the "provisions of the Income Tax Acts "and any regulations made thereunder relating to super-tax "assessments and the collection and recovery of super-tax" which are made applicable by sub-s. 2, I turn to s. 42, sub-s. 7, of the Finance Act, 1927. That section relates to surtax, which was substituted for super-tax by the Act of 1927, but it is common ground between the parties that it is unnecessary, for the present purpose, to draw any distinction between the two taxes. Section 42, sub-s. 7, provides, inter alia, that "all the provisions of "the Income Tax Acts relating (*a*) to persons who are to be "chargeable with income tax at the standard rate and to assess-"ments to such tax . . . (*c*) to the collection and recovery of such "tax . . . shall, so far as they are applicable, apply to the charge, "assessment, collection and recovery of surtax". I do not think there can be any doubt that r. 16 is one of the provisions thus described, and thus r. 16 applies, "so far as it is applicable", to super-tax assessments and to the collection and recovery of super-tax charged under s. 21 of the Act of 1922; but I must next consider: What is the effect of the words "so far as applicable"? Turning again to s. 21, sub-s. 2, of the Finance Act, 1922, is there any reason why r. 16 should not apply to super-tax assessments and to the collection and recovery of super-tax charged under that section?

My Lords, I shall try the experiment of applying r. 16 to the provisions of s. 21, sub-s. 2, and see whether such application gives rise to any difficulties. Rule 16, so far as material, is as follows: "A married woman acting as a sole trader, or being "entitled to any property or profits to her separate use, shall "be assessable and chargeable to tax as if she were sole and "unmarried: Provided that—(1.) the profits of a married woman "living with her husband shall be deemed the profits of the "husband, and shall be assessed and charged in his name, and "not in her name or the name of her trustee".

For the sake of simplicity, I shall take the case of income apportioned to Mrs. Latilla. She was at all material times a married woman living with her husband, and the income apportioned to her must be deemed to be her income and to have been received by her, in accordance with s. 21, sub-s. 1, and para. 9, of Sch. I to the Act of 1922. This "deeming" must, in my view, have the effect of making this income "profits of a married "woman living with her husband" within r. 16. Mr. Grant did not contend that there was any distinction, for this purpose, between the word "income" and the word "profits". These profits, pursuant to r. 16, "shall be deemed the profits of the "husband, and shall be assessed and charged in his name". I think it follows that, prima facie and subject to the two difficulties which I am about to mention, in the case of Mrs. Latilla, a married woman living with her husband, the assessment must be upon her husband and not upon her.

It was said, however, on behalf of the respondents that the words "that member" in s. 21, sub-s. 2, can only refer to Mrs. Latilla, since she and not her husband was the "member "of the company" to whom the amount in question was apportioned. I agree that the word "member" refers to Mrs. Latilla, but as soon as the sum in question was apportioned to her it was deemed to be her husband's income under r. 16. For this reason I think that whenever s. 21 is dealing with assessment, it should be read as if the words "or, in the case of a married woman living "with her husband, the husband" were inserted after the word "member". So to read the section does not, in my view, do any violence to the language of the section; it is the inevitable result of the latter part of sub-s. 2, which applies r. 16 "so far "as it is applicable". On the other hand, at the beginning of sub-s. 2, where the reference is to apportionment and not to assessment, there is no need for the notional insertion of these words, since r. 16 has no effect on an apportionment under s. 21.

Another difficulty relied upon by counsel for the respondents arises from the fact that under sub-s. 2 the super-tax is to be assessed "upon that member in the name of the company". They pointed out that, under the proviso to r. 16, the profits there mentioned are to be assessed and charged in the name of the husband. Here, they say, a contradiction arises if "member" is given the suggested construction in s. 21, sub-s. 2. I think the simple answer to this difficulty is that r. 16 is to be applied "with any necessary modification" and that sub-s. 2 imposes a necessary modification by providing that the assessment, upon the member or her husband, as the case may be, shall be made in the name of the company.

I now turn to sub-s. 3 of s. 21. That sub-section deals with assessment and, in accordance with the principle which I have just stated, it should be read as if the words "or, in the case of "a married woman", etc., were inserted throughout after the word "member". So read, it gives rise to no difficulty.

The second sentence of sub-s. 4, in my judgment, strongly supports the view that the provisions of r. 16 should be imported into s. 21 in the manner which I have suggested. That sentence deals with the case in which "a member of a company has been "assessed to and has paid super-tax otherwise than under this "section in respect of any income which has also been assessed "and upon which super-tax has been paid under this section". As the reference is to the assessment of a member, the words "or, in the case of a married woman", etc., should be inserted if the principle already stated is to be applied. If the words "member of a company" are read with the addition of these words the provision has a sensible and natural result; the person who has borne double taxation, i.e., the husband, gets the relief specified in the sub-section. If, however, these words are not inserted the provision is wholly inoperative in the case of a married woman living with her husband, since such a married woman can never be assessed to or pay super-tax " otherwise than under this section ".

I do not think that sub-ss. 5 and 6 assist at all, nor does the extended definition of " member " in sub-s. 7; but sub-s. 8 is important because it brings into play Sch. I to the Act. I have already referred to para. 9 of that schedule, and para. 8, with its reference to " the statement of his total income ", strongly supports the view that r. 16 must be applied to the provisions of s. 21. There is no provision in income-tax law for a married woman living with her husband to make any return of total income, and any such provision would be inconsistent with r. 16. Thus para. 8 of Sch. I works smoothly if the husband is the person to be assessed, but does not work at all if the assessment is made on the married woman.

My Lords, so far, I have failed to find any reason why r. 16 should not be applied to the provisions of s. 21 in the manner which I have indicated, and s. 49 of the Act of 1922 supplies yet another reason why they should be applied. That section provides that " Part II of this Act shall be construed together " with the Income Tax Acts and the Acts relating to inhabited " house duty " and Part II includes s. 21.

I need not refer in detail to the later statutes, which will be dealt with by my noble and learned friend Lord McDermott. For the reasons which I have given, in my view s. 21 of the 1922 Act fixed the liability to be assessed for super-tax, in the case of a married woman living with her husband, upon the husband. By the Finance Act, 1927, surtax replaced super-tax and certain amendments were made in s. 21, but in my view none of the amendments had the effect of placing upon the wife the liability to be assessed, or of exempting the husband from that liability. Section 19, sub-s. 5, of the Finance Act, 1936, makes the tax recoverable from the husband, in the events there specified, whereas under the earlier Acts the husband could not be compelled to pay if he did not elect to pay. Again, the phrase " member on whom the tax was assessed " must, in my view, be read with the application of the provisions of r. 16, so as to refer to the husband in the case of a member who is a married woman living with her husband.

In the Court of Appeal, Singleton, L.J., pointed out (1) that in sub-s. 1 of s. 21, both in its original form and as amended by the Act of 1927, the word " member " was " sometimes to be

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(1) (1949) 28 A. T. C. 260, 265; [1949] 2 All E. R. 589, 595.

"read literally and at other times as meaning 'husband of the "'member, if the member is a married woman living with her "'husband'". I agree, but regret that the learned Lord Justice did not apply this reasoning to the vital sub-ss. 2 and 3.

I would allow the appeal and restore the order of Atkinson, J., affirming the assessments.

LORD MACDERMOTT. My Lords, these three appeals by the Commissioners of Inland Revenue all raise the same question. It may be stated thus: Is a husband living with his wife liable to pay surtax in respect of undistributed income of a company notionally attributed to his wife, as a member of the company, under the terms of s. 21 of the Finance Act, 1922, notwithstanding that those terms are on their face confined to members of the company and the husband himself is not such a member? The Special Commissioners and Atkinson, J., have answered this question in the affirmative. The Court of Appeal has unanimously answered it in the negative.

It will be convenient before referring to the facts to set out or summarize the more important provisions of the relevant enactments, all of which are to be construed (so far as they are not part thereof) together with the Income Tax Acts.

The Finance Act, 1922. Section 21 (as amended by s. 31, sub-s. 2, of the Finance Act, 1927, by the addition of the words shown in square brackets in sub-s. 1): "With a view to preventing the avoidance of the payment of super-tax through the "witholding from distribution of income of a company which "would otherwise be distributed, it is hereby enacted as "follows—(1.) Where it appears to the Special Commissioners "that any company to which this section applies has not, within "a reasonable time after the end of any year or other period "ending on any date subsequent to April 5, 1922, for which "accounts have been made up, distributed to its members in "such manner as to render the amount distributed liable to be "included in the statements to be made by the members of the "company of their total income for the purposes of super-tax, a "reasonable part of its actual income from all sources for the "said year or other period, the Commissioners may, by notice in "writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for "the year or other period specified in the notice, be deemed "to be the income of the members, and the amount thereof "shall be apportioned among the members [and super-tax "shall be assessed and charged under the provisions of this "section in respect of the sum so apportioned after deducting in "the case of each member any amount which has been distributed to him by the company in respect of the said year or "period in such manner that the amount distributed falls to be "included in the statement of total income to be made by that "member for the purposes of super-tax]: Provided that . . .

"(2.) Any super-tax chargeable under this section in respect "of the amount of the income of the company apportioned to any "member of the company, shall be assessed upon that member "in the name of the company, and, subject as hereinafter "provided, shall be payable by the company, and all the "provisions of the Income Tax Acts and any regulations made "thereunder relating to super-tax assessments and the collection "and recovery of super-tax shall, with any necessary modification, apply to super-tax assessments and to the collection and "recovery of super-tax charged under this section.

"(3.) A notice of charge to super-tax under this section shall "in the first instance be served on the member of the company "on whom the tax is assessed, and if that member does not "within twenty-eight days from the date of the notice elect to "pay the tax a notice of charge shall be served on the company "and the tax shall thereupon become payable by the company: "Provided that nothing in this sub-section shall prejudice the "right to recover from the company the super-tax charged in "respect of any member who has elected as aforesaid but who "fails to pay the tax by January 1, in the year of assessment "or within twenty-eight days of the date on which he so elected, 'whichever is later.

"(4.) Any undistributed income which has been assessed and "charged to super-tax under this section shall, when subsequently "distributed, be deemed not to form part of the total income "from all sources for the purposes of super-tax of any individual "entitled thereto.

"Where a member of a company has been assessed to and has "paid super-tax otherwise than under this section in respect of "any income which has also been assessed and upon which super-"tax has been paid under this section, he shall, on proof to the "satisfaction of the Special Commissioners of the double assess-"ment, be entitled to repayment of so much of the super-tax so "paid by him as was attributable to the inclusion in his total "income from all sources of the first-mentioned income".

Sub-section 6 defines the companies to which s. 21 applies; sub-s. 7 enacts that the expression " member " shall include any person having a share or interest in the capital or profits or income of a company; and sub-s. 8 applies for the purposes of the section the provisions of Sch. I.

Schedule I. This schedule, by paras. 1 and 10 thereof, provides for an appeal by the company, but not by a member, in respect of any direction or apportionment given or made under s. 21, sub-s. 1. It also provides, by para. 11, that any person in whose name any shares of a company are registered shall, if required by notice in writing by the Special Commissioners, state whether or not he is the beneficial owner of such shares, and if not the beneficial owner that he shall furnish the names and addresses of those on whose behalf the shares are registered.

Paragraphs 8 and 9 of the schedule, as amended by the Finance Act, 1927, run as follows: " 8. The apportionment of the " actual income from all sources of the company shall be made " by the Special Commissioners in accordance with the respective " interests of the members, and the income as apportioned to " each member so far as assessable and chargeable to super-tax " under s. 21 of this Act shall, for the purposes of super-tax, be " deemed to represent income from his interest in the company " for the year or other period and shall be included in the statement of his total income or in an amended statement of total " income which the Special Commissioners are hereby authorized " to require and shall be deemed to be the highest part of that " income. 9. The income apportioned to a member of a company so far as assessable and chargeable to super-tax under " s. 21 of this Act shall for the purposes of that tax be deemed " to have been received by him on the date to which the accounts " of the company for the year or period were made up or, if an " application in that behalf is made by the company to the " Special Commissioners at any time within the period limited by " this schedule for giving notice of appeal against the direction to " the Special Commissioners, on such date as those Commissioners determined to be just, having regard to the dates on " which distributions of income have been made by the company, " and so as to avoid, as far as possible, the inclusion for the " purposes of super-tax for any year of income referable to more " than one year ".

The Finance Act, 1927. By s. 38, sub-s. 1, of this Act surtax was imposed as an additional income tax on higher income, in substitution for super-tax, in terms which make the ascertainment of the "total income" of the subject a necessary prerequisite to his assessment to surtax. By s. 38, sub-s. 2, the expression "total income" in relation to any person means "the total "income of that person from all sources estimated, as the case "may be, either in accordance with the provisions of the Income "Tax Acts as they apply to income tax chargeable at the standard "rate or in accordance with those provisions as they apply to "surtax". By s. 42 provision is made as to the payment and assessment of surtax, and sub-s. 7 thereof enacts (inter alia) that "all the provisions of the Income Tax Acts relating—(*a*) to persons who are to be chargeable with income tax at the standard "rate and to assessments to such tax . . . shall, so far as they "are applicable, apply to the charge, assessment, collection and "recovery of surtax . . .". Sub-s. 9 provides for the separate assessment of a husband and wife upon an application being made for that purpose in the prescribed manner.

The Finance Act, 1936. Section 19, sub-s. 5: "Where a "notice of charge is served on a company or the liquidator of a "company under sub-s. 3 of the said s. 21, and the tax thereupon "becoming payable is not paid by the company before the expiration of three months from the date of service or before January 2 "following the year of assessment (whichever is the later), the "tax shall thereupon, without prejudice to the right to recover "it from the company, be recoverable from the member on whom "the tax was assessed".

The Income Tax Act, 1918. Sections 4 to 8, inclusive, dealt with super-tax, but it is unnecessary to set them out as they were repealed by the Act of 1927 and it is conceded that in all relevant respects there is no material difference between their provisions and those now relating to surtax.

Rule 16 of the General Rules Applicable to All Schedules: "A married woman acting as a sole trader, or being entitled to "any property or profits to her separate use, shall be assessable "and chargeable to tax as if she were sole and unmarried: Provided that—(1.) the profits of a married woman living with her "husband shall be deemed the profits of the husband, and shall "be assessed and charged in his name, and not in her name or "the name of her trustee; . . .".

The material facts are as follows:—The company immediately concerned (hereinafter called "the company") was F. P. H. Finance Trust Ld. It was a finance company, financing and dealing in the shares of gold-mining companies. Its capital at all relevant times consisted of 1,000 1*l*. ordinary shares and 10,000 1*l*. preference shares. The respective rights of the two shareholding classes were unusual. The preference shareholders had the voting control of the company. They were entitled to a fixed cumulative dividend of 5 per cent. and, subject thereto, the ordinary shareholders were entitled to the whole of the profits declared for distribution as dividends. On a winding-up the ordinary shareholders were entitled to repayment of the nominal amount of their shares, and, after that, the whole of the surplus assets were divisible among the preference shareholders. The 1,000 ordinary shares were held by a public company, the National Mining Corporation Ld., and the 10,000 preference shares were held by three married ladies living with their husbands. They were (1.) Mrs. E. M. Latilla, the wife of Mr. H. G. Latilla, an original appellant who has died since the institution of these proceedings and whose executors (Barclays Bank Ld. and his widow the said Mrs. E. M. Latilla) are respondents in one of the present appeals; (2.) Mrs. G. Latilla-Campbell, daughter of the said Mr. H. G. Latilla and the wife of Mr. E. C. Latilla-Campbell, the respondent in another of these appeals; and (3.) Mrs. E. Mayo, another daughter of Mr. H. G. Latilla and the wife of Mr. Eric S. Mayo, the respondent in the remaining appeal.

The company made very large profits during the period of twenty-one months ending on December 31, 1936, at which date the amount standing to the credit of its profit and loss account was 939,167*l*. In 1937 a small dividend was declared amounting in all to 100*l*. on the ordinary and 46*l*. 11*s*. 6*d*. on the preference shares. In 1938 the company went into liquidation; the National Mining Corporation Ld. was paid 1,000*l*. in respect of its ordinary shares, and the remaining assets were distributed to Mrs. Latilla, Mrs. Latilla-Campbell and Mrs. Mayo as the holders of the preference shares. Subsequently the Special Commissioners, acting under s. 21, sub-s. 1, of the Act of 1922, made a direction that the income of the company for the said period of twenty-one months should be deemed the income of the members of the company, and they proceeded to apportion this income between the members.

The company appealed against the direction and apportionment so made, and, after much litigation, which need not now be traced, the matter came to your Lordships' House, where, on March 22, 1945, the direction was confirmed, as was also the following apportionment:—

	l.	s.	d.
To the National Mining Corporation Ld.	1,000	0	0
To Mrs. Latilla	285,996	5	0
To Mrs. Latilla-Campbell	285,910	7	6
To Mrs. Mayo	285,910	7	6

It may be observed in passing that this apportionment did not reflect the position as it would have been had the income of the company for the relevant period been actually distributed in accordance with the dividend rights of the two shareholding classes. The Special Commissioners in apportioning had construed the words of para. 8 of Sch. I to the Act of 1922—" in " accordance with the respective interests of the members "—as entitling them to take into account all the different interests of the members under the company's constitution, including the rights to undistributed profits on a winding-up, and this view was confirmed by this House in the proceedings to which I have referred: see *F. P. H. Finance Trust Ld.* v. *Inland Revenue Commissioners* (*No.* 2) (2).

In the meantime, in 1943, the Special Commissioners had made assessments to surtax for the year 1936–37 in respect of the sums apportioned to the three ladies as above set out. These are the assessments now under appeal. Each assessment was made on the husband of the lady concerned in the sum apportioned to her. The husbands were duly served under s. 21, sub-s. 3, with notice of charge. They did not elect to pay the tax. Notice of charge was then served upon the company in liquidation. It did not pay within the time limited by s. 19, sub-s. 5, of the Act of 1936, and as a result the present position is that, if the assessments were duly made on the husbands, the tax is now recoverable from them or, in the case of Mr. H. G. Latilla, from his executors.

It is agreed that the company was a company to which s. 21 of the Act of 1922 applied, and of a number of questions raised during the earlier stages of the litigation only that mentioned at the beginning of this opinion remains for decision. Were the Special Commissioners entitled to assess the husbands in respect of the sums apportioned to their wives under s. 21?

My Lords, the general purpose of s. 21 appears from its introductory words and, as respects members of a company who are not married women living with their husbands, its subsequent provisions are now reasonably clear. Difficulty does arise, however, where the members concerned are married women living with their husbands and beneficially entitled; but even in that case there are two points which may be regarded as beyond controversy. In the first place, it was plainly the intention of the legislature to make each of the sums apportioned to individuals subject to super-tax if, when the sum is reckoned in the total income, such tax is attracted. The question is not whether the sum apportioned to a married woman escapes the net altogether and in any event. It is whether the person to be assessed is the lady or her husband. And, secondly, it is, I think, no less clear that s. 21, if regarded in isolation and without reference to the enactments said to be incorporated therewith, contains nothing to authorize the assessment of the husband. The person to be assessed, if the language of sub-s. 2 is to be taken in its natural meaning and without qualification, is the member to whom an amount of the income of the company has been apportioned under sub-s. 1. Such member need not be the registered holder of shares, for he or she may be the beneficial owner having regard to the definition in sub-s. 7; but the husband of a member is not a member within that definition and there is nothing else to put him in the position of a member if one does not look beyond s. 21. This was conceded by the Crown and its case before your Lordships was based entirely on the ground that r. 16 of the General Rules was brought into operation by s. 21 with the result for which it contended, namely, that the husbands were properly assessed. For the respondents, on the other hand, it was submitted that r. 16 was not brought into play at all, and, alternatively, that if it was it did not justify the assessment of the husbands.

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(2) [1946] A. C. 38.

The first question to be considered, therefore, is whether r. 16 has been made applicable to assessments under s. 21. If it has, it must be by virtue of that part of sub-s. 2 of that section which provides " . . . and all the provisions of the Income Tax Acts and " any regulations made thereunder relating to super-tax assess- " ments . . . shall, with any necessary modification, apply to " super-tax assessments and to the collection and recovery of " super-tax charged under this section ". Now, by s. 42, sub-s. 7, of the Act of 1927 (which in this respect echoed one of the repealed provisions of the Act of 1918 as to super-tax) all the provisions of the Income Tax Acts relating to persons chargeable with income tax at the standard rate and to assessments to such tax are directed to be applied to the assessment, collection and recovery of surtax " so far as they are applicable ". But r. 16

is undoubtedly applicable to surtax, as it was to super-tax, and accordingly it must, in my opinion, be regarded as a provision "of the Income Tax Acts . . . relating to super-tax assessments", and, therefore, as a provision which "shall, with any necessary "modification," apply to surtax assessments under s. 21.

The next and more difficult question is as to the effect of this incorporation. There can be no doubt that the expression "members" is used in some places in s. 21 in nothing but its ordinary meaning as extended by the definition in sub-s. 7, that is to say, as signifying only the persons in whose names or on whose behalf shares in the company are held. Such, for example, seems to be the plain meaning of "members" on the first, third and fourth of the occasions on which the word is used in sub-s. 1. The conflict then is between, on the one hand, a construction which ascribes to the word throughout a meaning limited, as in places it must be limited, to its natural signification as extended by the definition, and, on the other, a construction by which the word is capable of including, where r. 16 so requires, a reference to the person who is the husband of and lives with the member to whom part of the company's income has been apportioned.

The choice to be made between these rival interpretations must depend on the nature and force of the impact which r. 16 and the other incorporated provisions make upon the structure of s. 21. The next step will be to examine this, but before doing so it will be well to refer to two general considerations which have to be kept in mind at this stage of the inquiry. First of all, s. 21 is, on the Crown's view—at any rate since s. 19, sub-s. 5, of the Act of 1936 became law—a most drastic enactment for the husbands of members of companies to which s. 21 relates, and that all the more as neither they nor their wives are accorded any right of appeal against the apportionments made, though such apportionments may well be the subject of acute controversy between different classes of shareholders. For this reason, if for no other, the natural meaning of the language used by the legislature ought only to be departed from on clear and cogent grounds. And, secondly, taxation is imposed by the language and not merely by the trend or habit of the relevant legislation. As Lord Cairns said in *Partington* v. *Attorney-General* (3): "If the person "sought to be taxed comes within the letter of the law he must "be taxed, however great the hardship may appear to the judicial "mind to be. On the other hand, if the Crown, seeking to

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(3) (1869) L. R. 4 H. L. 100, 122.

"recover the tax, cannot bring the subject within the letter of the "law, the subject is free, however apparently within the spirit of "the law the case might otherwise appear to be".

By the terms of sub-s. 1 of s. 21 the sum apportioned to the wife of each of the original appellants was deemed to be her income and, by para. 9 of Sch. I to that Act, to have been received by her on December 31, 1936, the end of the relevant accounting period. Apportioned income being, as was conceded, "profits" within the meaning of r. 16, it must, I think, follow from the wording of proviso 1 to that rule that this income had to be regarded as the profits of the husband. I do not forget that a proviso must be construed as such, nor yet that what I may call the double deeming necessitated by this application of r. 16 is a highly notional process. None the less, I think as a process it is described in terms sufficiently clear to leave no real doubt about the result. The terms of the proviso are mandatory: the apportioned income "shall be deemed the profits of the husband, "and shall be assessed and charged in his name", and *not* in the name of the wife. That being the position, what is the necessary effect on s. 21? Here attention may conveniently be focussed on sub-s. 2 of that section, and in particular on the part thereof which reads "shall be assessed upon that member in the "name of the company", for whichever construction prevails there will necessarily prevail at the other points where dispute may arise, including s. 19, sub-s. 5, of the Act of 1936.

My Lords, having reached this point, it seems to me no longer possible to regard the conflict as merely one between the natural meaning of "member" as applied to a married woman living with her husband and the general proposition of income tax law that a husband living with his wife is assessable in respect of her profits. That general proposition has now, as it were, become specific and as much a part of sub-s. 2 as the words "shall . . . "apply" can make it, for there seems no good reason why the intervening expression "with any necessary modification" should operate to alter the terms of proviso 1 to r. 16 in any material respect. Such a reason certainly cannot, in my opinion, be found in the words "in the name of the company" which occur in sub-s. 2. It was suggested in the course of the argument that these words were incompatible with the words in proviso 1, "shall "be assessed and charged in his name", but I do not think there is substance in this. Whatever the exact import of the words "in the name of the company" may be, the assessment under sub-s. 2 must also be on the individual and, therefore, in his name as well.

If, then, the imperative terms of proviso 1 to r. 16 are, as I would hold, to be read into sub-s. 2, the tax on the apportioned income must be assessed on the husband and cannot be assessed on the wife, and the only way of accommodating the language of the sub-section to this state of affairs is to read " member " as the Crown contends. This, there is no denying, involves an interpretation which does not ride elegantly on the language of the enactment, but if I am right in my views as to the applicability and effect of r. 16, I see no escape from it. On the contrary, there are to be found in the relevant legislation several further considerations which to my mind lend considerable support to this construction. These I regard as secondary rather than primary grounds for the conclusion I have reached, and I will therefore state them shortly.

They may be enumerated as follows: (1.) The contention of the respondents, if sound, would entirely stultify the purpose of s. 21 as regards the income apportioned to married women members living with their husbands, because the taxing Acts provide no means of compelling such members to make the return of total income without which surtax cannot be computed, or of assessing them separately from their husbands in the absence of an application by either spouse in that behalf.

(2.) Unless the husband is assessed in respect of his wife's income, or there has been an application for separate assessment, there is no provision for the aggregation of the incomes of husband and wife which is necessary for the assessment of surtax. The respondents endeavoured to meet this difficulty by an alternative submission to the effect that r. 16 applied to the extent, but only to the extent, of procuring such aggregation. I do not think one can halt there. If r. 16 is applicable to that extent it is, I think, impossible not to apply it completely and with the results I have mentioned above.

(3.) Apart altogether from r. 16, it seems fairly clear that the true construction of s. 21 does not require that the word " member " should be read as referring to the same individual throughout it. As Viscount Simon, L.C., said in *Penang and General Investment Trust Ld.* v. *Inland Revenue Commissioners* (4), after a reference to the definition of " member " in sub-s. 7: " I incline to think that, inasmuch as the apportionment

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(4) [1943] A. C. 486, 495.

"is 'amongst the members', it would be legitimate for the "Special Commissioners to apportion a proper fraction to the "beneficiary in the first instance if they already knew that the "shareholder on the register was a bare trustee. Information as "to this could be obtained under para. 11 of Sch. I, but whether "the Special Commissioners have the information, and act on it, "in the first instance, or not, it seems to me clear that an "original apportionment to a trustee may properly be followed up "by an assessment on the beneficiary". Though this may not take the present matter any great distance it at least serves to indicate that the words "upon that member" in sub-s. 2 have a wider scope than might at first appear to be the case.

(4.) An examination of the Income Tax Acts shows that proviso 1 to r. 16 (like its forerunner, s. 45 of the Act of 1842), is the only means of effecting the substitution of husband for wife under charging provisions which are no less clearly referable in their terms to the wife than is the word "member" in the present case. Thus—tax under Schs. A and B "shall be charged "on and paid by the occupier for the time being"—see r. 1 of No. VII of Sch. A and r. 4 of Sch. B. Tax under Sch. D "shall "be charged on and paid by the persons or bodies of persons "receiving or entitled to the income in respect of which tax under "this schedule is hereinbefore directed to be charged". See r. 1 of the miscellaneous rules of Sch. D. And, again, tax under Sch. E "shall be annually charged on every person having or "exercising an office or employment of profit . . .". In all these cases, though the married woman living with her husband may be the occupier of the lands or tenements subject to assessment under Sch. A or Sch. B, or the person actually receiving and entitled to the income chargeable under Sch. D, or having or exercising a particular office or employment of profit within the meaning of Sch. E, it is upon her husband and not upon her that (in the absence of an application for separate assessment) the tax is charged. Rule 16 has always been regarded as justifying this procedure and nothing very different is asked of it by the Crown in this case.

For these reasons I would allow the appeals and confirm the assessments.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue; Churchill, Clapham & Co.*

[HOUSE OF LORDS]

H. L. (E.)*

1950
Nov. 20, 21;
Dec. 14.

POTTS' EXECUTORS . . . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—Surtax—Settlement—" Body corporate connected with the " settlement "—Company making payments on behalf of settlor—Sums " paid directly or indirectly . . . to the settlor "—Payment made " by way of loan "—Sums chargeable to surtax—Finance Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 40, *sub-ss.* 1, 3, 5; *s.* 41, *sub-s.* 4 (*e*).

By the Finance Act, 1938, s. 40, sub-s. 1: " Any capital sum " paid directly or indirectly in any relevant year of assessment by " the trustees of a settlement to which this section applies to the " settlor shall (*a*) "—to the extent there stated be treated as the income of the said settlor. By sub-s. 3: " For the purpose of this " section, any capital sum paid to the settlor in any year of assessment by any body corporate connected with the settlement in that " year shall be treated as having been paid by the trustees of the " settlement in that year ". By sub-s. 5: " . . . in this section " (*a*) the expression ' capital sum ' means (i) any sum paid by way " of loan or repayment of a loan; and (ii) any other sum paid " otherwise than as income, being a sum which is not paid for full " consideration in money or money's worth . . .".

By a settlement made in 1939 the settlor settled 150,000*l*. on his infant grandchildren. He owned the entire share capital of a company, of which he was governing director, and shortly after the settlement the trustees thereof applied the settlement moneys in purchasing from him all the shares save one. It was conceded that the company was a " body corporate connected with the settlement " within s. 40, sub-s. 3, of the Finance Act, 1938. For many years before the settlement the settlor had had an account with the company which made on his behalf and at his request numerous payments, and credited him with the fees and expenses to which he was entitled as a director. The payments included subscriptions to charities and payments in respect of income tax and surtax. The account was often overdrawn in large sums. After his death additional assessments to surtax for the years ended April 5, 1940, and April 5, 1941, were made on his executors under s. 40 of the Finance Act, 1938, on the footing that capital sums as defined by sub-s. 5 (*a*) had been paid to him and must be treated under sub-s. 3 as paid by the trustees of the settlement to him.

Held (*per* Lord Simonds, Lord Normand, Lord Oaksey and Lord MacDermott, Lord Morton of Henryton dissenting) that the sums debited were neither sums paid to the settlor " by way of loan or " repayment of a loan " nor sums paid to him " otherwise than as

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* *Present*: LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

"income, being [sums] which [were] not paid for full consideration "in money or money's worth" within s. 40, sub-s. 5 (a), and that, accordingly, they were not "capital [sums] paid directly or "indirectly . . . to the settlor" within s. 40, sub-s. 1, and the assessments should be discharged.

Per Lord Morton of Henryton. The sums debited were "paid by "way of loan directly or indirectly to the settlor", but were not sums "paid otherwise than as income, being [sums] which [were] "not paid for full consideration in money or money's worth".

Decision of the Court of Appeal [1949] 2 K. B. 706 reversed.

APPEAL from the Court of Appeal (Evershed, M.R., Somervell and Denning, L.JJ.).

The facts, stated by Lord Simonds and Lord Morton of Henryton, were as follows:—The late G. W. Potts was until April, 1939, the owner of substantially the whole of the share capital of G. W. Potts Ld. which consisted of 50,000 shares of 1*l*. each. He was also governing director of the company receiving each year 5,000*l*. as remuneration and 1,500*l*. for expenses. He had for many years before 1939 a current account with the company in which he was credited with his remuneration and expenses and debited with various payments made by the company at his request, some being made to third parties (e.g., to charities and to the Inland Revenue Commissioners for tax) and some to himself (cash drawings): see para. 4 of the findings in the case stated.

In the year 1936 he formed the Carron Trust Ld., a trust company with a capital of 100*l*. divided into 100 shares of 1*l*. each. He held all but two of these shares by his nominees but was not a director of the company. On March 31, 1939, he, as settlor, executed a settlement of which Carron Trust Ld. was trustee and paid to that company as trustee the sum of 150,000*l*. upon trust to be invested at the trustee's sole discretion and to be held (subject to certain powers therein mentioned) upon trust for accumulation for the benefit of four named infant grandchildren of the settlor in the manner therein mentioned. On April 25, 1939, the trustee company as trustee of the settlement bought from the settlor or his nominees 49,999 fully paid shares of 1*l*. each in G. W. Potts Ld. at 3*l*. each. It has been throughout admitted that this company was a "body corporate connected "with the settlement" within the meaning of s. 40, sub-s. 3, of the Finance Act, 1938.

At the end of the year 1935 after being debited in his account with various sums, including subscriptions to charities, payments of tax and weekly cash drawings, the settlor was in credit in the sum of 2,612*l*. 4*s*. 7*d*. which was carried forward to the year 1936. At the end of 1936 he was similarly in credit in the sum of 1,377*l*.; at the end of 1937 the account was exactly balanced; at the end of 1938 he had a credit of 1,316*l*., but at the end of 1939, largely owing to the payment by the company on his behalf of a large sum for surtax, he was in debit in the sum of 8,850*l*.

As regarded the period from April 5, 1939, to April 5, 1941, the details appeared in the "Director's Account" for the period from January 18, 1939, to December 28, 1940, exhibited to the case stated. On May 5, 1939, the company paid the settlor's surtax amounting to 12,613*l*. 15*s*. 7*d*. The settlor's account was overdrawn before this payment was made and from that time on his account was never in credit. Between May 5 and December 31, 1939, a large number of payments were made by the company at the request of the settlor. They included payments of the settlor's income tax Sch. E, various sums of cash paid to the settlor himself (the largest being 212*l*.) and a number of payments to charities. During this period the settlor paid nothing into the account. At the end of the year the settlor was credited with his director's fees, 5,000*l*., and director's expenses, 1,500*l*., and this left his account in debit to the amount of 8,850*l*. 7*s*. 7*d*. In the year 1940 further payments were made by the company at the request of the settlor, including surtax, 28,000*l*. (two payments of 10,000*l*. and 18,000*l*.), income tax, 779*l*. 12*s*. 6*d*. and a payment as small as "Dunhill 2*s*. 10*d*.". On December 23, 1940, when the settlor resigned his position as governing director, he was credited with director's fees and expenses from January 1 to December 23, 1940. This credit reduced his debit balance to 32,570*l*. 1*s*. 3*d*., and on December 23, 1940, the settlor gave the company a cheque for that amount to balance the account.

He was at all material times a rich man and had ample liquid resources to pay all that he owed to the company. It was not suggested that the transactions between himself and the company were in any way colourable or a device for the evasion of tax. The company, whose primary business was that of meat salesmen, had power under cl. 3 (I) of its memorandum of association to make advances as well to any director as to customers and others with or without security and upon such terms as the company might approve and generally to act as bankers for customers and others, and under cl. 3 (L) to invest and deal with the moneys of the company not immediately required in or upon such securities and in such manner as might from time to time be determined in the absolute discretion of the directors.

It was in these circumstances that, the settlor having then died, additional assessments to surtax were made upon his executors in the sum of 50,107*l*. for the year ending April 5, 1940, and in the sum of 19,924*l*. for that ending April 5, 1941. These figures were subsequently adjusted and became respectively 55,383*l*. and 5,426*l*. and, after a further adjustment, 50,583*l*. and 5,470*l*. The assessments were made on the footing that these sums represented capital sums paid directly or indirectly to the settlor by the trustee of the settlement.

The Special Commissioners confirmed the assessment. Their conclusion, set out in the case stated for the opinion of the King's Bench Division of the High Court, was that the sums paid by the company were sums paid to the settlor by way of loan. They further said: "If the company were called upon to justify "its action in making the said payments reliance would have to "be placed upon cl. 3 (I) of the memorandum of association. . . . "We therefore hold that the said payments constitute capital "sums and . . . that capital sums have been paid indirectly to ". . . the settlor. The payments by the company direct to (for "example) the Commissioners of Inland Revenue for surtax are "*in substance* merely a convenient method which avoided the "necessity of the company paying to Mr. Potts and Mr. Potts "then paying the Commissioners of Inland Revenue". Such capital sums must be treated as paid by the trustees, because the company was "a body corporate connected with the settlement" within s. 41, sub-s. 4 (*e*), and accordingly the sums were chargeable to surtax under s. 40. On July 26, 1948, Singleton, J., reversed this decision and held that the payments in question were not capital sums paid to the settlor within s. 40, sub-s. 3. The Inland Revenue Commissioners appealed to the Court of Appeal, which reversed the decision of Singleton, J., holding (1.) that the phrase "paid to the settlor" in s. 40, sub-s. 3, included payments to him both direct and indirect, and (2.) that the sums in question were "paid by way of loan", "directly or indirectly . . . to the settlor", and were within the scope of s. 40, sub-s. 3. The executors appealed to the House of Lords.

Grant, *K.C.*, *Talbot*, *K.C.*, and *Desmond Miller* for the appellant executors. The words "directly or indirectly" in s. 40,

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sub-s. 1, of the Finance Act, 1938, should not be read into sub-s. 3 after the word " paid ", and unless they are so read the sums in question cannot be said to have been paid by the company to the settlor. In applying sub-s. 1 in this case, when resort is had to sub-s. 3, they should be ignored. Even if they are not ignored and are read into the sub-section, there is no sum here that has been paid to the settlor, because the sums in question were paid by the company to third parties at the settlor's request, and such sums were not paid directly or indirectly to him within the meaning of s. 40, sub-s. 3. To fulfil the sub-section a sum must be paid into his hands or reach them through some agent accountable to him; he must have dominion over it. But that was not the case here. The words used are not " to or " for the benefit of the settlor " nor " to or on behalf of the " settlor " nor " to or at the request of the settlor ": see the Finance Act, 1922, s. 20, sub-s. 1 (*b*); the Finance Act, 1936, s. 21, sub-s. 1; and the Finance Act, 1938, s. 38, sub-s. 4.

The real character of the transaction must be regarded to see whether it comes within the actual words of the section: see *Inland Revenue Commissioners* v. *Wesleyan and General Assurance Society* (1) and *Inland Revenue Commissioners* v. *Duke of Westminster* (2). The Crown's argument offends against the latter case. The sums in question were not capital sums within the meaning of sub-s. 5. There was no evidence on which they could be found to be paid " by way of loan " within sub-s. 5 (*a*) (i). Money paid to a third party at the settlor's request is not lent to the settlor. Money paid to B at the request of A is not money paid to A. In the old forms of pleading a distinction was made between the plea for money lent to the defendant and the plea for money paid at the request of the defendant to a third party: see Bullen and Leake's Precedents and Pleadings (3rd ed.), p. 839; (10th ed.), p. 224. See also *Victors* v. *Davies* (3) and *Lampleigh* v. *Braithwait* (4), and the observations in Smith's Leading Cases (13th ed.), vol. I, p. 148.

The distinction stands and in construing the present enactment regard should be had to it. There is nothing here that was a loan in the ordinary use of language: see the definitions of " loan " and " lend " in the Shorter Oxford English Dictionary. Here there is a current account with payments in from time to

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(1) [1948] L. J. R. 948, 950; 30 Tax Cas. 11, 25.

(2) [1936] A. C. 1, 19.

(3) (1844) 12 M. & W. 758.

(4) (1616) Hob. 105.

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time; every payment out is not to be treated as a loan nor every payment in as repayment of a loan. Solicitors who make disbursements for their clients are not lending them money. The settlor had ample means to pay what he owed, and people in that situation do not usually incur bank overdrafts. The analogy based on banking and money-lending is false. This was an ordinary commercial transaction. To bring it within the section there would have to be a real lending and a real borrowing: see *Inland Revenue Commissioners* v. *Rowntree & Co. Ld.* (5) and *Inland Revenue Commissioners* v. *Port of London Authority* (6). As to the question whether the sums were not paid for full consideration see *Attorney-General* v. *Boden* (7) and *Attorney-General* v. *Earl of Sandwich* (8). No part of the sums in question is required by s. 40 to be treated for the purposes of the Income Tax Acts as income of the settlor.

Pennycuick, K.C., and *R. P. Hills* for the Crown. The assessments were rightly made on the executors in pursuance of s. 40 of the Finance Act, 1938. Its object, as is apparent from its terms, was to deal with a form of tax evasion once very prevalent whereby a settlor made a settlement of assets on accumulation trusts so that no surtax was payable, the terms of the settlement providing that the trustees might invest the trust funds by lending them without security; the trustees would then make loans to the settlor by way of investment and he lived on the money so lent and never returned it; it was ultimately returned by his executors after his death and formed a deduction for estate duty purposes. The enactment of s. 40 was designed to meet this situation. It is not possible to argue the construction of the section on the ground of the hard result which might be produced in many cases.

The sums in question were paid to the settlor "by way of "loan" within s. 40, sub-s. 5 (*a*) (i). The words "directly or "indirectly" must be read into sub-s. 3. These sums were capital sums paid to the settlor indirectly by the company within the meaning of the sub-section. This follows from the facts found in the case stated that the company kept an account for the settlor and from time to time made payments to various parties at his request. Whenever his account was in debit there was a loan by the company to him, and whenever it was credited

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(5) [1948] 1 All E. R. 482, 484, 487.

(6) [1923] A. C. 507.

(7) [1912] 1 K. B. 539, 561.

(8) [1922] 2 K. B. 500.

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with any sum thereafter, until the account was balanced, there was a repayment of the loan. The company, for all practical purposes, acted as bankers for the settlor, and overdrafts are in law loans from the banker to the customer: see *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Society* (9) and *Cuthbert* v. *Robarts, Lubbock & Co.* (10), *per* Cozens-Hardy, M.R., and Buckley, L.J.

There is no distinction between the position of banker dealing with a customer and that of some other person or body which carries on the same sort of operations and profers the same services as those performed by a banker for his customer. A solicitor lends his client the money he disburses for him. What is ordinarily meant by a loan is the provision of financial accommodation in consideration of a promise to repay: see *Parsons* v. *Equitable Investment Co. Ld.* (11), *per* Lord Cozens-Hardy, M.R., *B. S. Lyle Ld.* v. *Chappell* (12), *Stott* v. *Shaw & Lee Ld.* (13), and *Rutherford* v. *Inland Revenue Commissioners* (14). Money may be "paid" to a person without being placed directly in his hand. For examples of payment in modern times effected by other methods: see the Finance Act, 1894, s. 3, and the Companies Act, 1948, s. 322, replacing s. 266 of the Act of 1929. Payment, in the case of a loan, covers not only direct payments into the hands of a borrower but also certain payments which are indirect.

In the present case even if there were nothing but the word "paid" in the sub-section, that would still cover the class of indirect payment here in question, but in addition there is the word "indirectly" imported into the sub-section. A payment made at the settlor's request to his agent is in law a payment made directly to him and the word "indirectly" gives the subsection a wider meaning still. The word "directly" indicates a payment to the settlor, whether or not through his agents; the word "indirectly" indicates any payment made on his direction which produces a pecuniary advantage to him equivalent to the sum paid. This applies to all sums paid by way of loan. It would cover a payment made by the lender in discharge of a debt owing by the borrower to a bank or any other creditor, or a payment made on the direction of the borrower to purchase an asset for him, whether a house or a motor licence or membership of a club or a credit at a bank. Such payments would be indirectly payments to the borrower (in this case the settlor) because they were made at his direction; they would enrich him either by increasing the volume of his assets or diminishing the amount of his liabilities.

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(9) (1884) 9 App. Cas. 857, 864, 868.

(10) [1909] 2 Ch. 226, 233, 235.

(11) [1916] 2 Ch. 527, 529, 530.

(12) [1932] 1 K. B. 691, 700.

(13) [1928] 2 K. B. 26.

(14) (1939) 23 Tax Cas. 8.

The other formulae suggested on behalf of the executors as being more appropriate to the Crown's contention are not so in reality. Thus " to or for the benefit of the settlor " would be inappropriate to cover a loan, since as used in the Finance Acts " benefit " involves the idea of bounty. " To or at the request " of the settlor " would likewise be inappropriate because it would cover payment to a third party on that third party's promise to repay. " To or on behalf of the settlor " if it meant " to the settlor or some other person on his behalf " would give no effect to the words " directly or indirectly " and would only cover payments to the settlor or his agent.

Thus the alternative formulae are all inappropriate since the draftsman of the Act meant to express something different from that which they express. The Crown is seeking to give their proper construction to words apt to cover many different forms of transaction. Its contentions do not offend against the decision in *Inland Revenue Commissioners* v. *Duke of Westminster* (15).

The executors relied on the old forms of pleading, contending that where A lent money to B by paying it into his hands the plea was for money lent, while if A paid the money to C at the request of B the plea was for money paid at the request of B, thus distinguishing the transaction from a loan. But it was necessary to plead the request of B in order to found the action because that constituted consideration supporting the promise to repay. That does not mean that it was not a transaction of loan in the ordinary modern sense. It is no straining of language to call it so: see *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (16).

A decision for the executors would produce the result that in order to escape from s. 40 all that a man need do would be to get his liabilities paid direct—a most unnatural construction. It would make it so easy to circumvent the Act as to render it useless for its object. In the alternative the payments were sums which were not paid for full consideration in money or money's worth within sub-s. 5 (*a*) (ii). The loans were without any provision for payment of interest, which is a normal incident

(15) [1936] A. C. 1.

(16) 9 App. Cas. 857.

of a loan. Accordingly there was not full consideration in money or money's worth.

Hills following. What the company was doing for its directors was banking business in the ordinary sense of the term, though it was not carrying on a general banking business. In its construction the language of s. 40 should not be narrowed or given a meaning contrary to its ordinary commercial use merely because in some cases hardship might be produced. If the executors' contention were right the section would have no practical effect at all. Often provisions of the Finance Acts have a wide impact within a restricted field. This is not a section which extends very widely, nor is this an ordinary case of a managing director; very few would come within the section. Before the imposition of surtax, voluntary settlements were only made inter vivos on marriage or in order to protect some person against himself, but since then they have been employed for other purposes, and that is what this section is concerned with. In this case the settlor was, in effect, borrowing for his own benefit from trustees of whom he was in control.

Grant, K.C., in reply. A payment, in order to come within s. 40, must be "to the settlor", but the Crown seek to apply it to a case where payment is not to the settlor. To cover these transactions other language would have to be used, for the language actually used does not. *Parsons* v. *Equitable Investment Co. Ld.* (17) and *B. S. Lyle Ld.* v. *Chappell* (18), relied on by the Crown, were concerned with a totally different line of country. The observations in the former case on which reliance was placed are obiter dicta and in any event not binding on the House of Lords. In the latter case the present point did not arise. From *Stott* v. *Shaw & Lee Ld.* (19) it appears why the bill of sale and banking cases were decided as they were: the principle there stated is not applicable in construing a taxing statute.

The principle of construction in such a case as the present is that laid down by Viscount Simon in *Inland Revenue Commissioners* v. *Wesleyan and General Assurance Society* (20). The transactions between the company and the settlor comprised a great deal that had nothing to do with banking transactions and there are more points of resemblance to transactions between other sorts of persons who are not bankers. The distinction

(17) [1916] 2 Ch. 527.
(18) [1932] 1 K. B. 691.
(19) [1928] 2 K. B. 26.
(20) [1948] L. J. R. 948.

between lending money directly to some person and paying money at his request to a third party goes far deeper than forms of pleading. The company was not lending money but making payments at the settlor's request. He referred to *Inland Revenue Commissioners* v. *Pemsel* (21).

Their Lordships took time for consideration.

Dec. 14. LORD SIMONDS. My Lords, this appeal raises a question on s. 40 of the Finance Act, 1938, a section which has not previously been considered in this House. [His Lordship stated the facts and continued:] The settlor having died, additional assessments to surtax were made on his executors in the sum of 50,107*l*. for the year ending April 5, 1940, and in the sum of 19,924*l*. for that ending April 5, 1941. These figures were subsequently adjusted and became respectively 55,383*l*. and 5,426*l*. and, after a further adjustment, 50,583*l*. and 5,470*l*. The assessments were made on the footing that these sums represented capital sums paid directly or indirectly to the settlor by the trustee of the settlement. It is time then to turn to the section which is said to have such a result. No question arises in regard to the quantum of the assessment, the only matter in dispute being whether the sums, with which the settlor was credited in the current account already mentioned, were capital sums upon which the section operated. It will be necessary therefore to refer to a few provisions only of the section.

Section 40 of the Finance Act, 1938, so far as relevant, provides as follows: "(1.) Any capital sum paid directly or "indirectly in any relevant year of assessment by the trustees "of a settlement to which this section applies to the settlor "shall—(*a*) to the extent to which the amount of that sum falls "within the amount of income available up to the end of that "year, be treated for all the purposes of the Income Tax Acts "as the income of the settlor for that year; . . . (3.) For the "purpose of this section, any capital sum paid to the settlor in "any year of assessment by any body corporate connected with "the settlement in that year shall be treated as having been "paid by the trustees of the settlement in that year. . . . (5.) . . . "in this section—(*a*) the expression 'capital sum' means (i) any "sum paid by way of loan or repayment of a loan; and (ii) any "other sum paid otherwise than as income, being a sum which

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(21) [1891] A. C. 531.

" is not paid for full consideration in money or money's worth; " . . .".

It is admitted that the company is a " body corporate connected with the settlement " and it follows that the validity of the assessments to which I have referred depends on the nature of the relevant transactions between the settlor and the company.

There was in the first place some argument whether the words " directly or indirectly " which occur in sub-s. 1 are to be read into sub-s. 3. In my opinion they clearly are, for the purpose and effect of that sub-section are merely to substitute payment by a body corporate connected with the settlement for payment by the trustees of the settlement. In other respects the measure of liability is intended to be the same.

The question, then, is whether the sums with which the settlor was debited in current account with the company were capital sums paid directly or indirectly by the company to him. This they would be if they were sums paid to him by way of loan or repayment of a loan, or were sums paid to him otherwise than as income which were not paid for full consideration in money or money's worth. These are true alternatives and I will consider the latter first. I cannot doubt, and the matter was not seriously contested by the respondents, that the sums in question having been paid at the request of the settlor and upon his promise express or implied to repay, there was full consideration given by the settlor for the payment. Some suggestion was made that, inasmuch as there was no provision for payment of interest, there was not full consideration. But that was an arrangement which was no doubt convenient to both parties. Though latterly the company was largely in credit, in the earlier years it had been the other way about and no interest was charged against the company. In my opinion this contention fails.

I turn to the question whether these sums were paid by way of loan directly or indirectly by the company to the settlor. The Special Commissioners held that the sums in question were " sums paid by way of loan ". They thought that if the company was called upon to justify the payments they would have to rely on the power to lend money contained in cl. 3 (I) of the memorandum of association and said " The payments by the company " direct to (for example) the Commissioners of Inland Revenue " for surtax are in substance merely a convenient method which " avoided the necessity of the company paying to Mr. Potts and " Mr. Potts then paying the Commissioners of Inland Revenue ".

There are, I think, sections in Revenue Acts which justify a reference to the substance of a transaction. But there is danger in forgetting the words used by Lord Tomlin in *Inland Revenue Commissioners* v. *Duke of Westminster* (22), which are cited by Singleton, J., in this case. The question is not what the transactions between the settlor and the company in substance were but whether they fell within the fair meaning of the section.

From the determination of the Commissioners the appellants appealed by way of case stated to the High Court, and on July 26, 1948, Singleton, J., allowed their appeal, holding in effect that no capital sum within the meaning of the section was during the relevant years paid to the settlor. From his judgment the respondents appealed to the Court of Appeal who allowed the appeal and restored the decision of the Commissioners. Evershed, M.R., in whose judgment Somervell and Denning, L.JJ., concurred, took the view which I have already expressed as to importing into sub-s. 3 the words " directly or indirectly " and came to the conclusion (23) that " the various payments made by " the company . . . ought fairly to be regarded as money paid " directly or indirectly by way of loan to Mr. Potts within the " meaning of the sub-section ". He was, I think, partly at least led to this conclusion by considering the position of a bank which by meeting a customer's cheques when he is overdrawn is deemed to have lent him money.

My Lords, I have come to a different conclusion. Reading the definition into the sub-section I must be satisfied that according to the fair meaning of the words these sums were sums paid by way of loan to the settlor directly or indirectly by the company. I do not think it matters whether the words " directly or " indirectly " qualify the payment or the receipt. I will assume they qualify both or either. The question is still whether the conditions of the composite phrase are fulfilled—were the sums paid to the settlor by way of loan? I do not doubt that in certain contexts money paid at A's request to B may be properly described as " paid to A ": see, e.g., *Parsons* v. *Equitable Investment Co. Ld.* (24), *per* Lord Cozens-Hardy, M.R. The explanation of this is to be found in the judgment of Shearman, J., in *Stott* v. *Shaw & Lee Ld.* (25): " . . . if the legal or business or commercial effect of the transaction can be taken to be " the same as that described in the bill of sale, then the courts " will hold the consideration to be truly stated ".

(22) [1936] A. C. 1, 19.
(23) [1949] 2 K. B. 706, 716.
(24) [1916] 2 Ch. 527, 530.
(25) [1928] 2 K. B. 26, 31.

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But this is not the way in which a taxing statute is to be read. I am not, in the construction of such a statute, entitled to say that, because the legal or business result is the same whether on the one hand I borrow money from the company and with it make certain payments, or on the other hand the company at my request makes certain payments on my implied promise to repay, therefore it is immaterial what words are in the statute if that result is attained.

Nor again is it relevant that, where a bank allows its customer to overdraw, the customer is to be regarded as having borrowed from the bank to the extent of the overdraft: a proposition in regard to which no doubt can be entertained: see *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (26). The company was not a bank and it would in my opinion be an abuse of language or at least the merest colloquialism to speak of the transaction between the company and the settlor as a banking transaction. The fact that the objects for which the company was established included that to which I have referred does not in my opinion affect the question.

That question remains as I have stated it, and my answer is that according to the ordinary fair meaning of the words the company did not pay any sums to the settlor by way of loan. It would in fact be as inapt to say that the company paid him sums by way of loan when he was in debit on the account as to say that he paid the company sums by way of loan when he was in credit. Some stress was laid on the distinction in the old forms of pleading between the plea for money lent to the defendant and the plea of money paid at the request of the defendant to a third party. I am not inclined to give much weight to this consideration but it does indicate that there is at least a formal difference between the two transactions.

So far, my Lords, I have not specifically dealt with the word "indirectly". It is sufficient to say that it cannot so enlarge the meaning of the words "paid to the settlor" as to include payment to some other person than the settlor for his own use and benefit. I do not feel called on to determine positively what transactions it might be apt to cover. It may be that it is not apt to cover any that are not already covered by the normal meaning of the words "paid to the settlor".

It was finally urged by learned counsel for the respondents that, if this appeal is allowed, an easy way of evading tax will be open to the taxpayer. This is an argument which is of no weight whatever. The question is what is the fair meaning of words in a taxing Act. I have given my answer to it and move that this appeal be allowed and the matter be remitted accordingly.

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(26) 9 App. Cas. 857, 868.

Lord Normand. My Lords, I shall not restate the facts, or repeat the provisions of the section on which the result of the appeal depends. The first and more difficult question is whether sums paid by the company to third parties by the settlor's request were, within the meaning of the Act, capital sums paid directly or indirectly to him by way of loan. These sums were either sums paid to the Inland Revenue in discharge of the settlor's tax obligations or other sums of which subscriptions paid to charities were taken as typical. There were also sums which were paid to the settlor himself but these were treated by the Special Commissioners as sums paid on account of the settlor's remuneration and expenses as the company's managing director.

It is not suggested that the words "capital sums paid directly "or indirectly to the settlor by way of a loan" have any special meaning imposed on them by the context. Each word must, if possible, be allowed its appropriate effect, yet it is the meaning of the whole expression, all the words being read together, that has to be found. The principles to be observed in applying the provisions of a taxing Act are stated by Lord Cairns in *Partington* v. *The Attorney-General* (27): "As I understand the principle of "all fiscal legislation, it is this—If the person sought to be taxed "comes within the letter of the law he must be taxed, however "great the hardship may appear to the judicial mind to be. On "the other hand, if the Crown, seeking to recover the tax, cannot "bring the subject within the letter of the law, the subject is "free, however apparently within the spirit of the law the case "might otherwise appear to be. In other words, if there be "admissible, in any statute, what is called an equitable construc"tion, certainly such a construction is not admissible in a taxing "statute, where you can simply adhere to the words of the "statute".

The Crown submitted that the payments made by request were capital sums paid indirectly to the settlor as loans. I shall refer presently to the authorities by which the submission was supported. But first I shall consider the meaning of the relevant words apart from authority. In my view they are apt to cover payments made as loans to third parties through whom the payment reaches the settlor himself, but they are not apt to cover payments made to third parties who are not accountable to the settlor and are entitled to retain the sums as their own moneys. This is a taxing Act and its terms are not to be enlarged by reasoning that the same final result is achieved as by a loan made to the settlor followed by a payment made by him to the third party.

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(27) (1869) L. R. 4 H. L. 100, 122.

The principle stated by Lord Tomlin in *Inland Revenue Commissioners* v. *Duke of Westminster* (28) is on the point conclusive. Lord Tomlin said: " It is said that in Revenue cases there " is a doctrine that the court may ignore the legal position and " regard what is called ' the substance of the matter ' and that " here the substance of the matter is that the annuitant was " serving the Duke for something equal to his former salary or " wages, and that therefore, while he is so serving, the annuity " must be treated as salary or wages. This supposed doctrine " (upon which the Commissioners apparently acted) seems to rest " for its support upon a misunderstanding of language used in " some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus, the better " it will be for all concerned, for the doctrine seems to involve " substituting ' the incertain and crooked cord of discretion ' for " ' the golden and straight metwand of the law ' (4 Inst. 41)". It would be inconsistent with this principle to accept the contention that the words should be extended to any payment made by the settlor's request to a third party which produces a pecuniary benefit to the settlor equivalent to the sum paid. It was said, however, that a payment made by the settlor's request to an agent or other person accountable to him is in law a payment made directly to the settlor and, therefore, that the word " indirectly " must have a wider significance than I have assigned to it. That is, with respect, to beg the question. In a taxing Act designed to prevent tax evasion by affecting with liability to tax sums paid to a settlor otherwise than as income, it was obviously necessary to provide for the case when persons accountable to the settlor are interposed between the payer and the settlor for the purpose of disguising the transaction. That is a satisfactory explanation of the use of the words " directly or " indirectly ". There is therefore no reason for extending the meaning of "indirectly" so as to include payments to third parties which the settlor has an interest to make whether in discharge of his legal liabilities or in furtherance of charities favoured by him. If that had been the intention other words would have been added.

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(28) [1936] A. C. 1, 19.

The respondents relied on *Parsons* v. *Equitable Investment Co. Ld.* (29). In that case it was held that a sum of money borrowed on a bill of sale and paid by the grantor's request to a creditor or another person was properly described as a payment to the grantor. But the ground of this conclusion was not that a payment made to B by A's direction is as a matter of general law a payment to A, but that the requirement of the Bills of Sale Act (1878) Amendment Act, 1882, s. 8, that the bill of sale shall truly set forth the consideration, had been construed in accordance with the principle that "if the legal or business or "commercial effect of the transaction can be taken to be the "same as that described in the bill of sale, then the courts will "hold the consideration to be truly stated", although "it is "perfectly clear that, strictly understood, it was untrue" (*Stott* v. *Shaw & Lee Ld.* (30), per Shearman, J.). In *B. S. Lyle Ld.* v. *Chappell* (31), another case relied on by the Crown, the rule of *Parsons* v. *Equitable Investment Co. Ld.* (32) was applied in a moneylender's action to the statements in the moneylender's memorandum. To apply these cases in construing a taxing Act is again flatly inconsistent with the principle established by *Inland Revenue Commissioners* v. *Duke of Westminster* (33). The court is not entitled to say that for the purposes of taxation the actual transaction is to be disregarded as "machinery" and that the substance or equivalent financial results are the relevant consideration. It may indeed be said that if these loose principles of construction had been liberally applied, they would in many instances have been adequate to deal with tax evasion and there would have been less frequent cause for the intervention of Parliament.

I therefore hold that the payments made by the settlor's request to third parties were not payments made directly or indirectly to the settlor. It is not necessary to consider whether they were payments made by way of loans. But since the question was argued I will state my opinion. There is a real distinction between a loan to A to enable him to pay his creditors and a payment to A's creditors made for the purpose of discharging his debts. It is a distinction recognized and taken advantage of both by commercial men and by others. But there are exceptions, for example in banking law payments to third parties are customers' loans if the account is overdrawn: *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (34); *Cuthbert* v. *Robarts, Lubbock & Co.* (35). All the controversial payments in the present case appear as items in a current account described as a director's account. It is a fair inference that the payments, whether to the settlor himself or to third parties, were deemed by the company to be authorized by the power in the memorandum of association to make advances to directors and customers and generally to act as bankers for customers and others. Nevertheless, the account is not a banker's account with his customer. For example, the payments with which the settlor is credited are not loans to the company, as are the payments into the bank when the customer's account is not overdrawn; nor were any of the payments made for the purpose of granting credit required by the settlor, who had at all times liquid resources ready to pay all that he owed to the company. I therefore think that the payments in question were not payments by way of loans as that word is understood in common parlance and as it is used in s. 40.

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(29) [1916] 2 Ch. 527.
(30) [1928] 2 K. B. 26, 30–1.
(31) [1932] 1 K. B. 691.
(32) [1916] 2 Ch. 527.
(33) [1936] A. C. 1.

The Crown did not offer more than a perfunctory submission that the payments made to third parties were not paid for full consideration in money or money's worth. The consideration was, in my opinion, the services rendered by the managing director coupled with an implied obligation of repayment on demand. Further, there is no finding that the consideration was not full consideration and I can find no ground for holding that full consideration was not given.

Courts of law are not concerned with extrinsic circumstances, such as that the provisions of s. 40 as I have construed them are of little value because they may easily be evaded by those who have the will to evade them; or that persons who contract genuine loans or receive repayment of genuine loans without any purpose of evasion and without in fact evading any liability to tax are as likely to be taxed under s. 40 as persons who contrive elaborate schemes of pretended loans for the purpose of evasion.

I would allow the appeal with costs.

(34) 9 App. Cas. 857.

(35) [1909] 2 Ch. 226.

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LORD OAKSEY. My Lords, I agree that this appeal should be allowed. The object of the Act, in my opinion, was to tax a settlor who obtained payment of capital sums from the trustees of his settlement or from companies connected with the settlement for which he had not given full consideration in money or money's worth; it cannot have been the object of the Act to tax him in respect of payments for which he had given full consideration. In these circumstances it appears to me that if the words of the Act are fairly susceptible of a meaning which attains this object they should be given that meaning rather than a meaning which goes beyond the object of the Act and leads to admitted injustice.

The first question is whether the sums in question are capital sums within the meaning of s. 40, sub-s. 5 (*a*). It was contended for the Crown that the sums paid by the company were sums paid by way of loan. In my opinion in the particular circumstances of this case the payments were not made by way of loan. They were made in accordance with the practice which had long existed by which the governing director of the company in which he had held all the shares directed or requested the company to make payments on his behalf as a matter of ordinary convenience. The company had never carried on a business of bankers or moneylenders and it is not in my opinion a fair use of language to describe payments made for the governing director in such circumstances as loans. According to the respondents' argument whenever the governing director's account became in debit there was a loan by the company to him and whenever it was credited with any sum thereafter until the account balanced there were repayments of loans.

The second question is whether even if the payments were made by way of loan they were paid directly or indirectly to the settlor. None of them was in fact paid to the settlor and from some of them the settlor derived no financial benefit since some of them were contributions to charities. Having regard to the object of the statute I think the words "paid directly or "indirectly to the settlor" should be held to mean paid into the settlor's hands or into the hands of someone accountable to him.

For my own part, I should also be prepared to decide the case upon the ground that the true construction of sub-s. 5 (*a*) (i) is that it refers only to sums paid by way of loan which are not paid for full consideration in money or money's worth and that in the present case the accommodation offered to the appellant was given for full consideration in money or money's worth.

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Lord Morton of Henryton. My Lords, the charging sub-section in s. 40 of the Finance Act, 1938, is sub-s. 1. It begins: "Any capital sum paid directly or indirectly in any relevant year "of assessment by the trustees of a settlement to which this "section applies to the settlor shall . . .". Then follow the words which give rise to the charge to tax. The ambit of the sub-section is enlarged by sub-s. 3, which provides: "For the "purpose of this section any capital sum paid to the settlor in "any year of assessment by any body corporate connected with "the settlement in that year shall be treated as having been paid "by the trustees of the settlement in that year". The effect of this latter sub-section is to insert in sub-s. 1 immediately after the words "to which this section applies" the words "or by "any body corporate connected with the settlement in that "year". It is admitted by the appellants that G. W. Potts Ld. (hereafter called "the company") is such a company.

The expression "capital sum" is defined by sub-s. 5 (*a*) as follows: "The expression 'capital sum' means—(i) any sum "paid by way of loan or repayment of a loan; and (ii) any other "sum paid otherwise than as income, being a sum which is not "paid for full consideration in money or money's worth".

Then follow some words which are immaterial for the present purpose. I agree with the Court of Appeal in thinking that sub-para. (ii) has no application in the present case, and the relevant words are "any sum paid by way of loan". The question for decision may, therefore, be expressed as follows, reading sub-ss. 1, 3 and 5 (*a*) (i) together and applying them to the facts of the present case: Were the sums paid out by the company in the relevant years of assessment, at the request of the settlor and upon his promise to repay, "sums paid by way of loan directly "or indirectly to the settlor"? This question can be sub-divided into two questions: (*a*) Were these sums paid by way of loan? (*b*) If so, were they paid directly or indirectly to the settlor?

For the purpose of considering the first of these two questions it is, I think, important to note the circumstances in which the sums under consideration were paid out by the company. To quote the case stated: "For many years Mr. Potts had had a "current account with the company. In these accounts Mr. "Potts was credited with his remuneration as Governing Director "and expenses and various payments were made by the company "at Mr. Potts' request, some payments being to third parties (e.g. "the Commissioners of Inland Revenue for tax and charities) "and some being payments to himself (cash drawings)". It is argued on behalf of the appellants that where there is a current account, with payments out and payments in from time to time, it would be wrong to treat every payment out as a " loan " within s. 40, sub-s. 5 (*a*) (i), and every payment in as a repayment of a loan. That case can be considered if and when it arises, but it is not the case now before your Lordships.

[His Lordship referred to the director's account for January 18, 1939, to December 28, 1940, and continued:] I have mentioned these facts in order to show that on every occasion on which a sum was paid out by the company during the relevant period it was in the nature of an overdraft. At the end of the year the settlor's director's fees and expenses were credited to him and this had the effect of reducing the overdraft, but no sum was ever paid in by the settlor during the relevant period until he gave the company the balancing cheque of 32,570*l*. 1*s*. 3*d*. on December 23, 1940.

Whether or not it is accurate to describe the company as carrying on the business of banking, there is no doubt that during the relevant period the company supplied money to the settlor as and when he requested the company to do so and debited him with each of these amounts. The only difference between the procedure adopted by the company and the procedure adopted by a bank granting an overdraft is that the company did not apparently require any security, and did not charge any interest on the sums debited to the settlor. This is not surprising, as the settlor was a rich man and all the shares in the company except two were held by nominees for him.

For the moment I shall only deal with the substantial sums, amounting to over 40,000*l*., which the company paid out, at the settlor's request, in discharge of his liabilities for income tax and surtax. My Lords, I think that the sums so paid out cannot accurately be described as anything other than loans to the settlor. To quote Lord Blackburn in *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (36): " [Bankers] " are under no obligation to honour cheques which exceed the " amount of the balance, or, in other words, to allow the customer " to overdraw. Bankers generally do accommodate their cus- " tomers by allowing such overdrafts to some extent; when they " do so the legal effect is that they lend the surplus to the " customer ". For the sake of example I shall take the sum of 28,000*l*. paid out in the month of March, 1940, in discharge of

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(36) 9 App. Cas. 857, 864.

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the settlor's liability for surtax. That transaction can, I think, be accurately stated as follows:—The settlor said: "Please pay "my surtax; if you do pay it I promise to repay the sum on "demand". When the money was paid to the Inland Revenue, it seems to me that it was lent to the settlor just as much as if the company had been a bank and had granted him an overdraft of that amount.

I now come to the second of the two questions already stated, viz.: Were the sums in question "paid directly or indirectly to "the settlor?" In agreement with the Court of Appeal and the Special Commissioners, I think that they were so paid. It is argued on behalf of the appellants that no sum can be "paid to "the settlor", even indirectly, unless it is either paid into his hands or reaches his hands through some agent who is accountable to him. I find myself unable to accept this argument. I think that a sum is paid *to* A.B., in the ordinary meaning of these words, if it is either paid into the hands of A.B. or into the hands of his duly authorized agent, and that the construction contended for by the appellants really gives no force to the words "directly "or indirectly". I think that these words cover at least two types of payment, a payment direct to the settlor or his agent and a payment, made at the request of the settlor, which confers a pecuniary advantage to the settlor equal to the sum paid, e.g., payment of a debt presently due from the settlor such as the income tax and surtax in the present case.

It seems to me that this construction accords with the intention of s. 40 as expressed by the words used therein, and the contrary view gives rise to some strange results. Let me assume that two rich men, X and Y, each make a settlement of the kind to which the section applies, for instance, a settlement of a sum of 50,000*l.* under which the income is to be accumulated so that no surtax attaches to that income. Assume further that both X and Y have other substantial income which attracts surtax and that they desire this surtax to be paid by the trustees of the settlement. X says to the trustees: "Pay my surtax and I "promise to repay you". Y says to the trustees: "I need "10,000*l.* in order to pay my surtax, give me a cheque and I "promise to repay you". If the appellants' contention is correct, the payment to X will not come within s. 40 and the payment to Y will come within it. This seems a very strange and capricious result, and incidentally it reveals an extremely simple way of making the section wholly ineffective. On the other hand, if my view is correct, X has received payment by way of loan indirectly and Y has received payment by way of loan directly within the meaning of the section and they will both equally be charged with tax. This is, I venture to think, a result which the legislature intended to achieve and, in my view, it has been achieved by the words used in the section.

I do not think it right to detain your Lordships by considering in detail the other payments such as subscriptions to charities. If the view which I have expressed commends itself to your Lordships, there is no dispute between the parties as to the figures in the assessments; if your Lordships are of a contrary opinion, the assessments cannot stand.

I would dismiss the appeal.

Lord MacDermott. My Lords, the question here is whether the aggregate of certain sums paid by G. W. Potts Ld. (hereinafter called " the company ") for and on behalf of the late Mr. G. W. Potts constituted (after certain deductions which need not be specified) a " capital sum paid directly or indirectly . . . by " the trustees of a settlement . . . to the settlor . . ." within the meaning of those words as used in sub-s. 1 of s. 40 of the Finance Act, 1938.

It was agreed that the company was a " body corporate con- " nected with the settlement " mentioned in the case stated for the purposes of sub-s. 3 of that section and, accordingly, that the payments in question, if otherwise within sub-s. 1, were to be treated as having been paid by the trustees of the said settlement of which Mr. Potts was the settlor. But it was in dispute whether the need to resort to sub-s. 3 in which the words " directly or indirectly " do not occur, had the effect of allowing those words to be ignored in applying sub-s. 1. I am satisfied that, on the true construction of the section, the expression " directly or indirectly " contained in sub-s. 1 forms a constant part of the enactment, whatever its effect may be, and I have therefore incorporated it in stating the question for decision.

This leaves two matters for consideration—(1.) Did the payments made by the company constitute a " capital sum " as defined by sub-s. 5 (*a*)? and (2.) If so, was such capital sum paid to the settlor? It is only if the answer to both these queries is in the affirmative that the assessments under review can be upheld.

My Lords, I incline to the opinion that the sums paid by the company could not, in any event, be brought within sub-s. 5 (*a*) (ii). If they come within that sub-section at all it must, I think, be under para. (*a*) (i) and then only by virtue of that part thereof which reads " any sum paid by way of loan ". Now, I entertain little doubt that in certain circumstances it may properly be said that, if A out of his own moneys pays a sum to B for and at the request of C, A has paid the sum by way of loan, and by way of loan to C in the sense, and only in the sense, that he has thereby created the relation of lender and borrower between himself and C. But this is not to say that all transactions of that kind are loans. They may be but incidents in some wider relationship, other than that of lender and borrower, and take, as it were, their colour from it. For example, a rent agent may have to pay rates and a solicitor may have to pay stamp duties for clients whose accounts are not in credit at the time of payment. But in the ordinary course of events I do not think it would occur to anyone, or be a correct use of language, to say that such disbursements were loans or made by way of loan. On the other hand, the kind of wider relationship to which I am referring may provide opportunity for transactions within it which are exceptional and beyond the normal scope of the relationship and which may properly be describable as loans and as nothing else.

The true view must depend on the circumstances. In the present case no attempt has been made to explore the position with these considerations in mind. It may have been impossible to do so. But, whatever the reason, there is no distinction drawn between the relevant items in the accounts; big or little, fiscal or charitable, they are all treated alike. Accordingly, I think this first question can only be settled on an assumption of normality which, with debits ranging from " Dunhill—2*s*. 10*d*." to " surtax "—18,000*l*." (vide director's account for 1940) seems to me to be assuming a good deal. For this reason and because, on the view I take of the rest of the case, it becomes unnecessary to do so, I do not propose to express any concluded opinion on this branch of the matter. I therefore proceed to the second question assuming, for the purpose, an affirmative answer to the first.

For the Crown it was submitted that whatever was paid to the order of the settlor was a payment to him within the meaning of sub-s. 1 and, in the alternative, that if a sum paid in that way was not paid directly to the settlor it was nevertheless paid indirectly to him. On the facts of this case I do not think there is room for this alternative argument. The relatively small amounts paid directly to Mr. Potts were well within his salary and may be left out of account. Of the other payments those

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that matter here were not made to Mr. Potts' agents or in some circuitous way designed to put the money under his control eventually. Had they been, the word "indirectly" might have had a part to play, for in that case the issue would be whether, as a matter of fact, payment had been made, one way or another, to the settlor. In short, as it appears to me, the words "directly or "indirectly" bear only on the mechanics of payment in fact. But the issue under consideration has to be related to payments which moved *from* Mr. Potts and is really one of law and not of fact. It is whether a payment made by A on behalf of C to B (which B is to retain as a gift or as in discharge of some obligation owed to him by C) is a payment by A to C within the meaning of sub-s. 1. As the Master of the Rolls observes (37), this problem is largely one of first impression. Differing from him with great respect, I would answer it in the negative: a man who pays his creditor does not pay himself, and if his agent discharges the debt on his behalf the position in this respect surely remains the same. I think the natural meaning of the words "paid . . . "to the settlor" signifies a payment that goes to the settlor, not one that goes away from him, and I see no good reason, either within s. 40 or without it, for substituting something else for the natural meaning.

It was said for the Crown that it was no straining of language, where A paid a sum to B at C's request and for C's benefit, to say that A had paid C. I cannot agree; the person paid is B and no one else, and the consideration that the payment is advantageous to C seems to me beside the point so far as concerns the construction of the material words. It was also urged that to hold against this last submission would be to make s. 40 so easy to circumvent that it would be useless for its purpose. That purpose, doubtless, was to prevent or discourage certain forms of tax evasion. But the section attempts this in a manner which may work great harm to innocent people, as by inflicting tax on the grossed-up amount of a loan so temporary that it might only be till the banks opened, or of a loan, genuinely borrowed and as genuinely repaid, to the settlor. Tax evasion often places the draftsman in great difficulty and it may not always be possible to avoid hurting the guiltless. But s. 40 seems capable of involving straight-forward transactions to such a considerable extent that a decision which may encourage the substitution of something better need not be a matter for regret.

(37) [1949] 2 K. B. 706, 716.

I would hold, then, that no capital sum was paid to the settlor within the meaning of sub-s. 1 and for that reason I would allow the appeal and restore the order of Singleton, J.

Appeal allowed.

Solicitors: *Allen & Overy*; *Solicitor of Inland Revenue.*

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HUNTER . . . . APPELLANT;
AND
BLACKWOOD AND ANOTHER . . . . . RESPONDENTS.

SAME . . . . APPELLANT;
AND
MURRAY AND OTHERS . . . . . . RESPONDENTS.

Scotland—Emergency legislation—Superior and vassal—Right in security—War damage to land—Value payment and interest—Division among superior, vassal and bondholder—Period between date of damage and date of payment—Rights of parties—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 10, 24, 25; *Sch. IV, Part II.*

The War Damage Act, 1943, provided for payments by the War Damage Commission in respect of war damage to land. By s. 10, sub-s. 5, in the case of a value payment interest at 2½ per cent. a year was payable from the occurrence of the war damage to the date of payment. By s. 25, as applied to Scotland by Sch. IV, Part II, as between superior and vassal in the case of a property owned under feu contract, the superior was given the right to recover part of the value payment on discharging the feu-duty so far as the value of the charged land was depreciated by the war damage. If the land had been burdened by the vassal with a heritable bond in security, then by s. 24 the remainder of the payment was payable to the heritable creditor, who must account for it to the vassal.

In respect of the destruction by enemy action of two properties held under feu contracts and burdened with bonds and dispositions in security on which interest at 4½ per cent. was payable, value payments were claimed and obtained. Since the war damage the vassal had paid no feu-duties to the superiors; nor had he paid interest on the bonds. Part of the war damage payments was paid to the superiors under the Act and the balance, together with interest at 2½ per cent. on the whole, was paid to the bondholders, subject to the obligation to account to the vassal.

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* *Present*: LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD REID.

Held, (1.) that the Act had no effect on the ordinary feudal and contractual rights of the superiors until they had claimed and had been paid part of the value payment, and that, for the interval between the occurrence of the war damage and the payment of the sum, the full feu-duty remained payable; and (2.) that the bondholders were entitled to retain the principal sums due to them and also interest at the rate of 4½ per cent. stipulated in the bonds down to the date of payment of the value payments to them.

Decision of the First Division of the Court of Session (sub nom. *Macfarlane's Trustees* v. *Neill's Trustee, Neill's Trustee* v. *City of Glasgow Friendly Society*) 1949 S. C. 384 affirmed.

APPEAL from the First Division of the Court of Session.

The appellant Hunter (Neill's testamentary trustee) hereinafter called "the vassal", was the owner under feu contracts of two tenement properties in Clydebank, which were destroyed by enemy action on March 13, 1941, and he continued at all material times to own the sites of those properties. The respondents in the first appeal, John Blackwood and Ian Grant (a Mrs. Macfarlane's testamentary trustees), were the superiors of these properties, the feu-duties being 13*l*. 14*s*. 8*d*. and 13*l*. 15*s*. 1*d*. respectively. The respondents in the second appeal, John Murray and others (trustees for the City of Glasgow Friendly Society), hereinafter called the bondholders, held a bond and disposition in security for 600*l*. over each property, the interest payable being at the rate of 4½ per cent. per annum. After the destruction of the tenements the vassal ceased to pay the feu-duties and the interest on the bonds, but no action was taken with regard to this.

Claims were made under the War Damage Act, 1943, and on November 8, 1947, the War Damage Commission made payments of 1,466*l*. 12*s*. 0*d*. and 1,308*l*. 6*s*. 7*d*. respectively in respect of the two properties, amounting in all to 2,774*l*. 18*s*. 7*d*. These payments were made as value payments, under the Act, together with interest on those payments paid in terms of the Act at the rate of 2½ per cent. per annum for the period from the date of the war damage to the date of payment of the value payments. It was admitted that value payments were properly made in this case and there was no question as to their amounts. The superiors elected to exercise their right under s. 25 of the Act and the capital sums payable to them were adjusted at 224*l*. 13*s*. 4*d*. and 225*l*. 1*s*. 8*d*. for the two properties respectively, calculated on the basis that the annual value of each was reduced to 2*l*. 10*s*. 0*d*. These sums were paid by the Commission direct to the superiors, which left sums of 1,241*l*. 18*s*. 8*d*. and 1,083*l*. 4*s*. 11*d*. respectively to be paid to the bondholders.

In accounting to the vassal the bondholders proposed to retain in the case of each of the two properties 703*l*. 16*s*. 6*d*., being the amount of the bond (600*l*.) and interest on it at 4½ per cent. from November 11, 1940 (the last day on which interest had been paid), until the date of the value payment, leaving balances payable to the vassal of 538*l*. 2*s*. 2*d*. and 379*l*. 8*s*. 5*d*. respectively. The vassal, who contended that between the date of the damage and the date of the value payments, the bondholders were entitled to interest at the rate of 2½ per cent. only, claimed that the balances payable to him were 582*l*. 0*s*. 11*d*. and 423*l*. 7*s*. 2*d*. respectively.

In 1948 two actions were raised, one by the superiors against the vassal and the other by the vassal against the bondholders. In the first the superiors claimed payment by the vassal of the arrears of feu-duty and interest thereon. In the second the vassal claimed payment by the bondholders of the abovementioned balances.

By interlocutors dated March 29, 1949, the First Division of the Court of Session adhered to interlocutors of the Lord Ordinary Lord Sorn dated November 18, 1948. In the first case the decision was unanimous; in the second the decision was by a majority (Lord President Cooper, Lord Russell and Lord Keith; Lord Carmont dissenting). The court held (1.) that the superiors, until they received their share of the value payments, were entitled to enjoy their ordinary rights and accordingly were entitled to the full feu-duty from the vassal for the period in question; and (2.) that in accounting to the vassal the bondholders were entitled to retain interest at the rate stipulated in the bonds. The vassal Hunter appealed to the House of Lords.

Shaw, *K.C.*, and *Hook* (both of the Scottish Bar) for the appellant vassal.

M'Kechnie, *K.C.*, and *Anderson* (both of the Scottish Bar) for the respondent superiors.

M'Kechnie, *K.C.* (of the Scottish Bar) and *J. O. M. Hunter* (of the English and Scottish Bars) for the respondent bondholders.

Shaw, K.C. On the true construction of s. 25 of the War Damage Act, 1943, modified in its application to Scotland by Sch. IV, Pt. II, the superiors are not entitled to the feu-duties claimed, since they have elected to take part of the value payment. On them fell the loss of the real security and it is in respect of that loss that a share in the value payment vests in them. It vests "at the material time" (s. 25, sub-s. 1), and it is compensation for the discharge of part of the feu-duty (Sch. IV, Pt. II, para. 9). Accordingly the discharge must be taken to have been effected "at the material time", viz., the date of the damage, so that thereafter the superiors were only entitled to interest under the Act. The right to receive a share in the statutory moneys must be ascertained entirely from the terms of the Act, since the compensation is wholly a creation of statute. It is irrelevant to consider what would have been the common law rights of a particular beneficiary. The provisions of the Act are not regulated by any reference to rights at common law or under contract.

The valuation on which the compensation is to be calculated is not related to the actual situation in any given case. The values are arbitrarily fixed by statute and may vary greatly from the actual facts at the date of the damage: see s. 7, sub-s. 2; s. 10, sub-ss. 1 and 2; s. 25, sub-s. 1. Under the Act the vassal's rights in the value payment are subject to those of the superior and the bondholder, i.e., rights to "part of the value "payment" (see s. 25). The vesting is at "the material time" (s. 12, sub-s. 2), i.e., the date of damage when the loss was sustained. Here the vassal is only entitled to the balance of the value payment and interest after deducting the other two parts and interest thereon.

The shares of the other two parties, equally with that of the vassal, carry the right to their respective proportions of the statutory interest, since the interest accrues on the value payment as a whole from the date of the damage and the right in a part of the value payment vests in these other parties as at that date. In respect of loss of income during the period between date of damage and actual payment of the compensation the vassal is entitled under the Act only to 2½ per cent. on the share of the value payment to which he is entitled.

The Act does not indicate that the other persons receiving shares in the fund are in a different position. The statutory provisions for the ascertainment of the superiors' loss rest on the basis that as from the date of the damage they will be entitled

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to receive out of the subjects only the available annual value of the damaged subjects, i.e., 5 per cent. of the depreciated value as ascertained for the purpose of fixing the amount of the value payment (see Sch. IV, Pt. I, para. 3 (*a*)). The giving to the superiors of a right to a share of the value payment necessarily carries with it an appropriate proportion of the statutory interest. There is no mention of interest in s. 25 because the superiors receive only what they are entitled to retain, whereas interest is referred to in s. 24 because thereunder the bondholders receive both their own share and the vassal's capital and interest, retaining their own with interest and paying over the balance. In the application of s. 25 to Scotland (see sub-s. 3) sub-s. 2 (*b*) is not applicable: see Sch. IV, Pt. II, para. 8, which cannot be read as leaving it unmodified. Its terms must be so read, and in equity there is every reason for the modification. So far as Scotland is concerned s. 25, sub-s. 2 (*b*), is redundant, since it is designed to meet a situation which could not arise there. If it applied the superiors must succeed.

As to the claim of the bondholders, on the true construction of s. 24, from the date of the damage they are only entitled to interest at the statutory rate of 2½ per cent. If it had been intended that the bondholders should account for what they received as at the date of receipt this could easily have been expressed by providing that they should account for the amount as if it were the proceeds of a power of sale exercised at the date at which payment of the compensation was made to them. The section as its stands has not that effect. Its words visualize proceeds of sale as existing at the time when the statutory interest begins to run, whereas if the proceeds are assumed to come into existence only at the date when the accounting takes place, no interest could then have accrued thereon. Where the value payment is more than sufficient to cover the amount of the bond, the bondholder must pay over to the owner the whole remaining balance of the value payment with the statutory interest on that balance; the bondholder is entitled to retain to his own use out of the money he has received only the principal sum in the bond and the statutory interest thereon. What the bondholders receive and are required to account for is the value payment and the interest thereon. They are to account as if what they received were the proceeds of a sale at the material time and the interest thereon. The assumption that the section should be construed so as to put the bondholders in the same position as they would have occupied had there been a sale of the subjects in the ordinary course was erroneous. The problem was entirely one of the interpretation of s. 24, unembarrassed by anything outside the Act.

Under the Act the fictional sale is assumed to have taken place at "the material time", i.e., immediately before the occurrence of the war damage, and so the bondholders receive payment of their bond at that time. On the fictional sale the interest stipulated in the bond does not run, the bond being discharged. The interest is running on the purchase price and so it cannot run on the bond. If s. 24 had anything to do with the fixing of the amount of the value payment it might be important that this was nominally a sale of undamaged property.

As to sub-s. 1 (*a*), that was inserted to meet such cases as that in which the destroyed property may have formed only a small part of the security for the bond and where the bond had, after the damage, been paid off in full; such cases require a modification of the general provisions of the section, but the proviso does not affect the construction now submitted.

[LORD SIMONDS intimated that their Lordships did not require to hear counsel for the respondents on the case of the superiors, but wished to hear them on the case of the bondholders.]

M'Kechnie, K.C. The bondholders and the superiors are in different situations. The former are entitled to 2½ per cent. interest and the latter are not. The former made war damage contributions and the latter did not. What the bondholders get is laid down by s. 24. On its true construction they are entitled to receive out of the value payments interest on the bonds, so far as it is unpaid, at the stipulated rate of 4½ per cent. up to November 8, 1947, and they were entitled to account to the vassal on that basis. The section implies that the interest under the bond continues to accrue unless it has been duly paid. Under the section the liability of the bondholders to account is expressed by reference to a fictional sale, under a power of sale in the bond, effected by the bondholder. This fiction is for accounting purposes. The bondholders are entitled to account as if the value payments and accrued interest were proceeds of sale under the bonds. In the case of such a rule a bondholder is obliged to account only after receipt of the price and is entitled to satisfy himself out of the price and any interest thereon both for the principal sum in the bond and for interest at the rate stipulated in the bond down to the date of receipt of the price. Such an accounting is without prejudice to the rights of the bondholder under the personal obligation in the bond. The bondholders here are enforcing their common-law rights to the stipulated payments. In order to abrogate those rights the vassal must point to something in the Act. But there is no express provision therein relating to the extinction of the bondholders' rights including the personal obligation under the bond and the granting of discharges. The legislature intended the ordinary rules to operate, including the requirement of payment of the principal sum and interest at the stipulated rate in full down to the date of the receipt of the proceeds of the fictional sale. Nothing in s. 24 entitles the vassal to say that the rights of the bondholders were extinguished retrospectively by implication.

The bondholders' contention is supported by the provisoes to sub-s. 1, particularly proviso (*a*), which rests on the assumption that in default of payment of the principal sums in the bond and the stipulated interest in full or of agreement between the parties, the bondholder's rights remain entire till he can satisfy them in full out of the value payment or otherwise. The minute the bombs fell on these properties there was nothing to sell. A notional sale is assumed because one must go back to a time when there was something there. But one does not need to have a notional accounting.

Their Lordships took time for consideration.

February 7, 1951. LORD NORMAND. My Lords, my noble and learned friend Lord Simonds, who is unable to attend to-day, has asked me to say that he agrees with the opinion of my noble and learned friend, Lord Reid, which he has had the advantage of reading in print. My Lords, I also agree with the opinion of my noble and learned friend, Lord Reid.

LORD MORTON OF HENRYTON. My Lords, the Lord Ordinary has delivered a most lucid and convincing opinion covering both of the cases now under appeal. With that opinion, which was affirmed by the First Division of the Court of Session, I entirely agree. I would dismiss both appeals.

LORD MACDERMOTT. My Lords, I have had the opportunity of reading in print the opinion about to be delivered by my noble and learned friend, Lord Reid. I agree with his reasoning and with the conclusions he has reached.

LORD REID. My Lords, in this case two appeals were heard together. Each appeal is against an interlocutor of the First Division of the Court of Session dated March 29, 1949. By these interlocutors the First Division adhered to interlocutors of the Lord Ordinary Lord Sorn of date November 18, 1948. In the first case the First Division was unanimous; in the second the decision was by a majority, the Lord President, Lord Russell and Lord Keith, Lord Carmont dissenting.

The appellant was the owner of two tenement properties in Clydebank which were destroyed by enemy action on March 13, 1941, and he still owns the sites of these properties. The respondents in the first appeal were and are the superiors of these properties, the feu-duties being 13*l.* 14*s.* 8*d.* and 13*l.* 15*s.* 1*d.* respectively. The respondents in the second appeal held a bond and disposition in security for 600*l.* over each property. After the destruction of the tenements the appellant ceased to pay the feu-duties and the interest on the bonds and no action appears to have been taken with regard to this until certain payments were made by the War Damage Commission. In 1947 the War Damage Commission made payments in respect of these properties amounting in all to 2,774*l.* 18*s.* 7*d.* These payments were made as value payments under the War Damage Act, 1943, together with interest on the value payments paid in terms of the Act at the rate of 2½ per cent. per annum for the period from the date of the war damage to the date of payment of the value payments. It is admitted that value payments were properly made in this case and there is no question about their amount.

In 1948 two actions were raised the purpose of which was in effect to determine the rights of the superiors, the vassal and the bondholders respectively with regard to the sums paid by the War Damage Commission. One action was raised by the superiors against the vassal, and the other was raised by the vassal against the bondholders. The reason why the questions at issue were raised in this way becomes apparent on examining the provisions of the Act.

The rights of the superior are to be found in s. 25 of the War Damage Act, 1943, but before examining this section it may be well to note that the Scottish application section, s. 124, so defines "proprietary interest" as to exclude the estate and interest of a superior and brings in the superior as if he were the owner of a rentcharge created out of the vassal's proprietary interest. So in this case the only "proprietary interest" is that of the appellant. I should also note that "the material time" is defined in s. 12. It is the time by reference to which the vesting of the right to receive a value payment is to be regulated and is, subject to exceptions which do not apply in this case, the time immediately before the occurrence of the war damage. Where there is only one proprietary interest involved the right to receive the value payment and the interest thereon vests in the owner of the proprietary interest, subject to the provisions of ss. 24 to 30 of the Act.

The material parts of s. 25, sub-s. 1, are as follows (for clarity I omit those parts which do not in my view throw any light on the questions with which this case is concerned): "Where a "value payment is to be made and at the material time there "was subsisting a rentcharge created out of a proprietary "interest . . . in any land in the hereditament . . . and the "person who was the owner of the rentcharge at the material "time shows that" [certain specified] "conditions are satisfied, ". . . a right to receive a part of the value payment shall vest "in the person who was the owner of the rentcharge at the "material time, and, where the said right is exercised, effect "shall be given thereto out of . . . the value payment . . .".

The conditions referred to were satisfied in this case. The scheme of the Act is that the superior (as the "owner of a rent-"charge") is entitled to come in and receive a part of the value payment if, and only if, the feu-duty exceeds the annual value of the subjects after the war damage and no building sufficient to bring up the annual value of the subjects to the amount of the feu-duty has been carried out or is likely to be carried out within a reasonable period. In that event the superior is entitled to a part of the value payment equal to the capital equivalent of the difference between the feu-duty and the annual value of the subjects as depreciated by the war damage. In this case the annual value of each of the two properties after the war damage was 2*l*. 10*s*. and the respondents in the first appeal were therefore entitled to receive parts of the value payments equal to the capital equivalent of the difference between each feu-duty and 2*l*. 10*s*. These respondents duly claimed to exercise their right to receive these parts of the value payments and they have received out of the value payments sums amounting in all to 449*l*. 15*s*.

The question at issue between the superiors and the vassal arises in this way. The superiors contend that the Act has no effect on the ordinary feudal and contractual rights of a superior until the superior has claimed and has been paid a part of the value payment; and that for the interval between the occurrence of the war damage and the payment of that sum the full feu-duty remains payable. Accordingly the action raised by the superiors is an ordinary petitory action for unpaid arrears of feu-duty. The vassal on the other hand contends that, if a superior elects to take a part of a value payment under s. 25, the superior's part of the value payment must be taken to have vested in him at "the material time" with the result that that part of the feu-duty for the discharge of which this payment is compensation must be taken to have been discharged as from "the material "time" and that thereafter instead of the discharged part of the feu-duty the superior is entitled to receive the statutory interest on his share of the value payment. That would be an intelligible scheme for the solution of a difficult problem but the question is whether it is the scheme which the Act provides. That question must be determined by examination of the rest of the section.

The relevant provisions are to be found in s. 25, sub-ss. 2 (*b*) and 8, and in Pt. II of Sch. IV which is referred to in sub-s. 8. Those provisions are as follows:—Section 25: ". . . (2.) Where "the said right is exercised . . . (*b*) so much of the rentcharge "as is equal to the said excess shall be extinguished on the date "on which the part of the value payment to be paid in respect "of the rentcharge is paid, and, as between the persons interested "in the charged land in the hereditament on the one hand and "in any other land subject to the rentcharge on the other hand, "the proper share of the persons interested in the charged land "in the hereditament of the liability for the residue of the rent-"charge in respect of any period after the extinguishment shall "be treated as being an amount per annum equal to the "available annual value of the charged land in the hereditament "as depreciated by the war damage. . . . (8.) In the application "of this Act to Scotland, there shall be substituted, for references "to a rentcharge, references to a feu-duty and to a ground "annual; and this section shall have effect in its application to "Scotland subject to the modifications specified in Pt. II of "Sch. IV to this Act".

Part II of Sch. IV is in these terms: "7. In the application "of s. 25 of this Act and of Part I of this Schedule to "Scotland, for any reference therein to a rentcharge created "out of the fee simple in any land there shall be substituted a "reference to a feu-duty or ground annual payable by the owner "of the fee simple in such land; references therein to the owner "of a rentcharge shall be construed accordingly; and references "therein to a rentcharge created out of a tenancy shall not "apply. 8. The right conferred by s. 25 of this Act as "modified by the last preceding paragraph on a superior or "the creditor in a ground annual to receive a part of a value "payment shall not be exerciseable until—(*a*) in the case where "the feu-duty or ground annual is payable in respect of the "charged land in the hereditament and also of other land, the "part of such feu-duty or ground annual attributable to the "charged land in the hereditament has been allocated thereon; "and (*b*) the feu-duty or ground annual or the part thereof so "allocated, as the case may be, in so far as it exceeds the annual "value of the charged land in the hereditament as depreciated "by the war damage has been discharged. 9. Where for the "purpose of this Part of this Schedule a feu-duty or ground "annual is required to be allocated or a feu-duty or a ground "annual or a part thereof so allocated is required to be dis-"charged, the superior or the creditor in the ground annual shall "execute and record in the appropriate register of sasines—(*a*) a "memorandum specifying the sum to be allocated and describing "particularly or by reference the land on which it is to be "allocated; or, as the case may be, (*b*) a discharge of the feu-"duty or ground annual or part specifying the extent to which "the same is discharged and describing particularly or by refer-"ence the land so disburdened; and any such allocation or "discharge shall be binding on all having interest".

It is clear from the first part of sub-s. 2 (*b*) that where there is a true rentcharge the whole of that rentcharge remains payable until the value payment is paid and the discharge of the appropriate part of it only operates from that date. It was properly admitted that if this part of the sub-section applies in Scotland the superior must succeed in this case. But it was argued that no part of sub-s. 2 (*b*) applies in Scotland. It is true that the latter part of the sub-section does not apply in Scotland because it is inconsistent with the provisions of Pt. II of Sch. IV. But the question is whether the first part of the sub-section can also be excluded. I do not think so. I do not find any inconsistency between it and any of the Scottish application provisions. The scheme for England is comparatively simple. No change takes place in the rights of the owner of the rentcharge until the value payment is paid but at that date that part of the rentcharge is extinguished for which the value payment is received as compensation. There is no room here for any interest being paid to the owner of the rentcharge in respect of the value payment for the period between the occurrence of the war damage and the date of payment of the value payment because for that period the owner of the rentcharge is entitled to as much as he would have got if there had been no war damage. So s. 25 makes no provision for any payment of interest to the owner of a rentcharge. The appellant's argument requires that the Act shall be held to have provided quite a different scheme for Scotland so that the discharge of a part of the feu-duty dates back to the date of the war damage and interest on the value payment is due to the superior from that date.

I cannot find anything to support that argument. The purpose of Pt. II of Sch. IV appears to me to be to ensure that the changes in the rights of the superior brought about by the Act shall appear in the Register of Sasines; and that purpose is achieved by providing that the superior is not to receive any part of the value payment until the necessary conveyancing steps have been taken and the appropriate discharge has been recorded. There is no need for this purpose that the discharge should operate for any period before the date of recording and of receipt of the appropriate amount out of the value payment and the schedule contains nothing to indicate that the discharge is to be antedated. Moreover, I do not see how there can be read into the section a provision that in Scotland, unlike England, interest is payable on sums due under s. 25: but the scheme for which the appellant contends requires such a provision. I therefore think that the first appeal fails and should be dismissed.

The second appeal is in an action in which the vassal sues the bondholders and it depends on the proper interpretation of s. 24, sub-s. 1, of the Act, which is in the following terms: "Where "a value payment is to be made and at the material time a "proprietary interest in the hereditament was subject to a "mortgage, the right to receive so much of the payment and of "the interest thereon as is attributable to that proprietary "interest shall vest in the mortgagee, and the mortgagee shall "be liable to account therefor as if so much of the payment and "of the interest thereon as he is entitled to receive had been "respectively proceeds of sale of that proprietary interest "arising under a power of sale exercised by the mortgagee at "the material time and interest on such proceeds, except that "the mortgagee shall not be entitled to credit for any costs "incurred by him in connexion with the claiming, ascertainment, ". . . or making of the payment".

It is not disputed that under this section the whole of the value payments and statutory interest thereon, excepting that part of the value payments payable to the superiors, was properly paid to the bondholders and that the appellant is only entitled to recover from them what is left after their claims have been satisfied. The bondholders claim to be entitled to retain the principal sums due under their bonds and also interest at the rate of 4½ per cent. stipulated in the bonds down to the date of payment of the value payments to them. The appellant admits that the bondholders are entitled to retain the principal sums due to them and also interest at the rate of 4½ per cent. down to the date of the war damage in so far as that is still unpaid; but he contends that for the period between the date of the war damage and the date of payment of the value payments to the bondholders they are only entitled to interest at the statutory rate of 2½ per cent. Accordingly the appellant brought an action against the second respondents for payment of the difference between the amounts received by them and the amounts which the appellant admits that they are entitled to retain. In defence these respondents admitted liability to pay the difference between the amounts received by them and the amounts which they maintain they are entitled to retain.

Section 24 is not easy to interpret because the bondholders' liability to account is made to depend on a fiction. A bondholder is bound to account as if the value payment and statutory interest thereon which he has received from the War Damage Commission had been respectively proceeds of a sale of the security subjects immediately before the date of the war damage and interest on such proceeds. It is therefore necessary to see what are the rights of a bondholder who sells the security subjects under his power of sale: they are set out in s. 122 of the Titles to Land Consolidation (Scotland) Act, 1868: "The creditor, upon receipt "of the price, shall be bound to hold count and reckoning "therefor with the debtor and postponed creditors, if any such "there be, or with any other party having interest, and to con-"sign the surplus which may remain, after deducting the debt "secured, with the interest due thereon and penalties incurred" and certain other expenses including the "whole expenses "attending such sale", and payments specified. It was not disputed that this means that the creditor may retain interest at the stipulated rate down to the date when he receives payment of the price. It is not the date on which the sale takes place that matters. Section 24 directs us to suppose that a sale took

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Lord Reid.

place immediately before the occurrence of the war damage, in this case in 1941; but it omits to state expressly on what date we are to suppose that the bondholder received payment of the proceeds of the sale.

I am of opinion that we must suppose payment of these proceeds to have been received on the date when the value payments were in fact received. In the first place if Parliament had intended a different date I would expect that to have been stated and, secondly, although the reference to interest in the section is very obscure, I think that it points in the same direction. The bondholder is to account as if the statutory interest which he receives had been interest on the proceeds of sale. I think that we are to suppose that in this case the proceeds of the supposed sale in 1941 did not reach the second respondents until 1947 and that somehow interest had been accruing on those proceeds during that interval. One can perhaps suppose that the purchasers delayed to make payment and that they had been taken bound to pay interest, or possibly one can suppose that the purchase price had been consigned pending the settlement of some dispute and had been earning interest. No doubt the supposition is far-fetched but I do not think it is impossible.

On the other hand, I find the reference to interest in the Act still more difficult to reconcile with the idea that we are to suppose the purchase price to have been received by the respondents in 1941 and that for some reason they did not hold count and reckoning with the appellant as directed by the Act of 1868 until 1947. Section 25 says that the statutory interest received by the respondents is to be treated as if it had been interest on the proceeds of sale. I think that must mean as if the statutory interest had been received by them as interest which had already accrued when they received it, and not as if it were interest accruing on money while it was in their possession. If we are to suppose that the "proceeds of sale" only came into the respondents' hands in 1947 and there is nothing in the section to displace the ordinary rule under the Act of 1868, it follows that the respondents are entitled to interest in terms of their bonds and dispositions in security down to 1947 when, on receipt of the "proceeds of sale", their right under their bonds to receive interest came to an end and they became bound to hold count and reckoning with the appellant.

I fully recognize that a fiction must not be pressed too far and that however far this fiction is pressed it does not enable all the difficulties to be solved. As pointed out by the Lord

President (1), the Act fails to make any provision for clearing the record of the respondents' bonds and dispositions in security, and for this the fiction does not help. I would be very willing to break away from the fiction if I could see anything better to put in its place, and I therefore turn to consider the dissenting opinion of Lord Carmont. He took the view that the accounting between the parties ought to take place at the date of the war damage, the date of the supposed sale. He thought that the result would then be more equitable: it may be that it would, though I prefer not to express any opinion on that question. But he based his opinion, I think, on the supposed sale bringing to an end not only the bondholder's rights in the security subjects but also his personal right against the debtor in the bond. It is true that the statute pays no heed to the personal obligation and makes no provision for its discharge, but I am unable to agree that this "points to the wiping out of the personal obligation as "from the date when the Exchequer is bound to provide a "surrogatum for the security subjects" (2). If the statute says nothing about the discharge of that obligation I think that the inference should be that it has left that obligation to be discharged in the ordinary way—that is, by payment. Whatever may have happened to the creditors' security, the personal obligation must, I think, remain until it is discharged either in the ordinary way or under some provision in the Act. On this matter—and indeed throughout—I am in agreement with the Lord Ordinary and I need not repeat what he has said. In short, I think that the appellant could only succeed in this appeal if he could show either that, although the respondents in fact only received the money due to them in 1947, they must be deemed notionally to have received it in 1941, or that there is something in the Act which brought the appellant's personal obligation to an end before the respondents received payment. As I am of opinion that the appellant fails on both points I think that this appeal should also be dismissed.

Appeals dismissed.

Solicitors: *Lawrence, Jones & Co., for Macpherson & Mackay W.S., Edinburgh, and Niven, Macniven & Co., Glasgow; Chamberlain & Co., for Ferguson, Reekie & Kilgour, W.S., Edinburgh, and Grant & Wylie, Glasgow; Lawrence, Graham & Co., for Laing & Motherwell W.S., Edinburgh, and Montgomerie, Flemings, Fyfe, MacLean & Co., Glasgow.*

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(1) 1949 S. C. 384, 398.

(2) Ibid. 404.

J. C.*

1951
Feb. 28;
Apr. 16.

ARTHUR REGINALD PERERA . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Contempt of court—Ceylon—Prison visitors' book—Entry by member of Legislature—Inaccurate comment in good faith on hearing of appeals in absence of prisoners—Whether contempt—Costs.

The appellant, a member of the House of Representatives in Ceylon, when visiting the Remand Prison at Colombo as part of his public duties, received a complaint from some of the prisoners to the effect that they had not been present in court when their appeals against conviction were being heard, and a prison jailor told him " we do not take all the prisoners, but only those who are " undefended ". That was not an accurate statement, and the only foundation for it was the then-prevailing practice (since abandoned) of the High Court in dealing with unstamped petitions of appeal, which practice in fact involved no differentiation between defended and undefended prisoners, and did not amount to the hearing of anything which could be called an appeal in the absence of the prisoner. Being then unaware of that, however, and relying on the information which he had received from the prisoners and the jailor, the appellant made the following entry in the prison visitors' book, which by Ordinance was required to be kept to enable specified classes of persons, including members of the legislature, to record their observations and recommendations: " The present " practice of appeals of remand prisoners being heard in their " absence is not healthy. When represented by counsel or otherwise " the prisoner should be present at proceedings ". A rule having been served on the appellant requiring him to show cause why he should not be punished for contempt of court in making the entry in the visitors' book:—

Held, applying the general rules which the Board apply in determining appeals from criminal convictions, that the appellant had not been guilty of contempt of court: he had acted in good faith and in discharge of what he believed to be his duty as a member of the legislature; he made no public use of the inaccurate information; the words made no direct reference to the court or to any of its judges, or to the course of justice or to the process of the courts; his criticism was honest criticism on a matter of public importance; there was nothing in his conduct which came within the definition of contempt of court—that there must be involved some " act done or writing published calculated to bring a court or " a judge of the court into contempt or to lower his authority ",

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* *Present:* LORD SIMONDS, LORD MORTON OF HENRYTON and LORD RADCLIFFE.

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1951

Arthur Reginald Perera v. The King.

or something "calculated to obstruct or interfere with the due "course of justice or the lawful process of the courts": *Reg.* v. *Gray* [1900] 2 Q. B. 36, 40.

Costs were awarded against the Crown.

Order of the Supreme Court of Ceylon reversed.

Appeal (No. 53 of 1950), by special leave, from an order of the Supreme Court of Ceylon (July 25, 1950), whereby the appellant was adjudged guilty of contempt of court.

On June 20, 1950, the appellant, Arthur Reginald Perera, visited Colombo Remand Prison as a member of the House of Representatives. A number of prisoners complained to him that they had not been present in court when their appeals against convictions were being considered, and the escorting prison jailor told him "we do not take all the prisoners, but only those who "are undefended". The appellant wrote in the prison visitors' book: "The present practice of appeals of remand prisoners being "heard in their absence is not healthy. When represented by "counsel or otherwise the prisoner should be present at proceed-"ings". The information which the appellant had received at the prison was not accurate, and in any case he thought that the prison authorities were responsible for the alleged practice.

The appellant was directed to show cause why he should not be punished for contempt of court in making the above entry in the visitors' book. The matter came before Basnayake, J., and he was found guilty of contempt and ordered to pay a fine of Rs.500, and in default to undergo six weeks' rigorous imprisonment.

1951. Feb. 28. *Dingle Foot*, *R. Millner* and *S. A. Tellis* for the appellant. It has been held that there can be no appeal within the Island of Ceylon itself against an order committing a person for contempt: *In re Wijesinghe* (1); in the face of that decision the appellant came straight to this Board. According to all the authorities, to constitute contempt of court there must be something which is calculated to obstruct or interfere with the course of justice or the due administration of the law: *In re a Special Reference from the Bahama Islands* (2); *McLeod* v. *St. Aubyn* (3); *Reg.* v. *Gray* (4); *Ambard* v. *Attorney-General for Trinidad and Tobago* (5), and *Debi Prasad Sharma* v. *The King-Emperor* (6). The statement here complained of has not

(1) (1913) 16 C. N. L. R. 312.
(2) [1893] A. C. 138, 148.
(3) [1899] A. C. 549, 560.
(4) [1900] 2 Q. B. 36, 40.
(5) [1936] A. C. 322, 334.
(6) (1943) L. R. 70 I. A. 216, 223.

in any way obstructed or interfered with the course of justice or the due administration of the law. Secondly, even if the words had been intended as a criticism on the Supreme Court, they would have constituted an entirely reasonable criticism, and one which any member of the public was entitled to make: *Ambard's* case (5). Thirdly, a fortiori, there cannot be a contempt where there is no intention to refer to the court at all. There must be an element of malice in order to constitute a contempt of court, and there can be no malice where the person concerned did not even know that the practice alleged resulted from an order of the court. Lastly, even if it were possible to construe the words as a contempt, there was a perfectly ample apology which ought to have been accepted.

This matter is one which quite clearly comes within the Board's powers in dealing with criminal appeals. Costs have been given in a number of cases of this kind. *Parashuram Detaram Shamdasani* v. *King-Emperor* (7) deals most fully with the matter. There appears to be no case since the beginning of the century in which the individual judge was made respondent, and in those circumstances it seemed that the appellant was bound to make the Crown respondent in this case, and if that be so it is submitted that it is a proper case for an order for costs: *Ambard's* case (5) and *Shamdasani's* case (7). The whole committal order was entirely misconceived. The appellant was carrying out a public duty and doing something that he was fully entitled to do. Even his application to the court for an adjournment so that he might obtain further legal assistance was refused, and he had to make his own submissions. It would be harsh to him if he were not to have his costs simply because the Crown does not appear before the Board. [Reference was made to *Johnson* v. *The King* (8) and *Waugh* v. *The King* (9).] The present is quite an exceptional case, and one in which the Board would be justified in making an order for costs.

Feb. 28. LORD SIMONDS announced that their Lordships would humbly advise His Majesty that the appeal should be allowed, subject to the qualification that, before making any order on the respondent for payment of costs, they proposed to intimate to those representing the respondent in this country that, if they wished an opportunity of showing why an order for costs should

(5) [1936] A. C. 322, 334.
(7) (1945) L. R. 72 I. A. 189, 195.
(8) [1904] A. C. 817, 824.
(9) [1950] A. C. 203.

not be made against the respondent, an opportunity would be given to do so.

March 8. *Gahan* for the Crown. In exercising its discretion the Board's practice is not to make an order for costs in a matter of this kind unless there are some special circumstances of improper conduct on the part of the party who is ordered to pay costs: *McLeod* v. *St. Aubyn* (10); *Shamdasani's* case (11). In the present case the Executive has done nothing to seek to justify or uphold this committal order; they have not appeared on the appeal or opposed the petition for special leave. It is only in the case of some ill-advised conduct on the part of the Crown that any order for costs is made against the Crown. If an order for costs is sought against the judge there is no reason why he should not be made a party to the appeal. In *Shamdasani's* case (11) the Crown must necessarily have been a party to that appeal; the order was made in that case because the Executive had sought to justify what was done. In these contempt cases the general rule is that there is no order for costs; it is only in very exceptional cases of misconduct where an order for costs has been made.

Dingle Foot was not called on.

LORD SIMONDS announced that the Board would order that the Crown should pay the appellant's costs.

April 16. LORD RADCLIFFE delivered the reasons of their Lordships for allowing the appeal, as follows:—This is an appeal, by special leave, from an order of the Supreme Court of Ceylon, dated July 25, 1950, whereby the appellant was ordered to pay a fine of Rs.500 and, in default of payment, to undergo six weeks' rigorous imprisonment. This sentence was imposed by the court (Basnayake, J.) as a punishment for a contempt of court of which he held the appellant to have been guilty.

Owing to the nature of the proceedings there could be no appeal in Ceylon from this order. The appellant was, however, granted special leave to appeal by His Majesty in Council; and their Lordships have applied to his case the same general rules as it is their practice to apply on the occasions when appeals from criminal convictions are before the Board. The respondent was not represented at the hearing of the appeal or of the petition for special leave.

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(10) [1899] A. C. 549.

(11) L. R. 72 I. A. 189, 192, 195.

The appellant, Mr. Perera, is a member of the House of Representatives in Ceylon. On June 20, 1950, he paid a visit to the Remand Prison at Colombo and was escorted round the prison by one of the jailors. It appears that for many years past it was the practice that members of the State Council should make occasional visits to public institutions for the purpose of information or inspection, and after 1948, when the House of Representatives came into being, the practice was continued by members of that House. The Prison Amendment Ordinance (No. 53 of 1939), s. 35, makes provision for the jailor of a prison to keep, inter alia, a visitors' book in which judges of the Supreme Court, Senators or members of the House of Representatives (as it now reads) and members of the Board of Prison Visitors may record observations or recommendations after a visit paid to the prison; and by the same Ordinance a direction is given that a copy of each new entry in the visitors' book is to be forwarded to the Inspector-General of Prisons.

In the course of this visit Mr. Perera received a complaint from some prisoners to the effect that they had not been present in court when their appeals against conviction were being heard. He asked the jailor accompanying him whether it was the case that some prisoners were not taken to court on such occasions, and was told: "We do not take all the prisoners, but only those "who are undefended".

It has become clear in these proceedings that that was not an accurate answer. The only foundation for it was the then prevailing practice of the High Court in dealing with unstamped petitions of appeal. These petitions were referred to a judge in chambers, Basnayake, J., who either rejected the petition for want of compliance with the due procedure or acted in revision in any that he regarded as deserving cases. This practice, which has since been abandoned, appears to have originated in an order of the former Chief Justice. It involved no differentiation between prisoners who were, and prisoners who were not, defended; nor did it amount to the hearing of anything that could be called an appeal in the absence of the appellant. But these particulars their Lordships have extracted from a letter which the Registrar of the Supreme Court furnished to Mr. Perera, at his request, after the court had found him guilty of contempt and imposed its fine. They were not known to him at the date of his visit to the Remand Prison.

Relying on what he had heard from the prisoners and the jailor, Mr. Perera made the following entry in the prison visitors' book: " Visited Remand Prison in the company of jailor Wije-" wardena. Premises clean. Adequate library facilities required. " The present practice of appeals of remand prisoners being heard " in their absence is not healthy. When represented by counsel " or otherwise the prisoner should be present at proceedings. In " my opinion not more than one prisoner should be in a cell " (7 × 9) approximately ".

It can be said at once that there was no reason at all to suppose that Mr. Perera, in making these observations, was acting with any other purpose than that of calling attention to an undesirable practice which had been brought to his attention. His visit to the prison had been undertaken as part of his public duties, and the visitors' book no doubt presented itself to him as the obvious place in which to record his comments and recommendations. On the day following his visit he wrote a letter to the Minister of Home Affairs and Rural Development bringing to his notice the substance of what he had recorded in the visitors' book and asking him to have these matters inquired into and redress provided.

The rest of the story can be shortly told. On June 29, 1950, the acting Commissioner of Prison and Probation Services forwarded Mr. Perera's remarks to the Registrar of the Supreme Court, asking for his observations. The Registrar submitted the paper to Basnayake, J., as the judge in charge of unstamped petitions from prisoners in jail, and the judge then wrote on it the following minute: " Registrar, The statement is incorrect and " is a contempt of the court. Issue a rule on A. Reginald Perera " returnable on Tuesday the 25th. I shall sit specially on that " day. (Sgd.) Hema Basnayake, 11/7/50 ".

Thereupon a rule returnable on July 25 was issued and served on Mr. Perera, ordering him to appear before Basnayake, J., on that day and show cause why he should not be punished for contempt of court in making in the visitors' book of Colombo Remand Prison the entry that has been set out above. On the day named Mr. Perera attended the court. He first requested that he might have further time, since he needed to obtain some documents not in his possession and further legal advice. This request was refused. He then made a statement to the judge. It is not necessary to go through it. Its purport was to explain without ambiguity the circumstances that had led to his making the entry complained of and to inform the court that in so doing he had acted in pursuance of his duties as a member of the legislature, and that he had no intention of bringing the court into disrepute or contempt. In response to the judge's questioning he made it clear that he had acted on the strength of the information given to him by the jail authority and that he had not been able to investigate the matter for himself. Finally, he submitted that his entry in the visitors' book did not amount to contempt of court. The judge pronounced him to be guilty of contempt and sentenced him to pay a fine of Rs.500, in default to undergo six weeks' rigorous imprisonment.

Their Lordships are satisfied that this order ought not to have been made. They have given the matter the anxious scrutiny that is due to any suggestion that something has been done which might impede the due administration of justice in Ceylon. And it is proper that the courts there should be vigilant to correct any misapprehension in the public that would lead to the belief that accused persons or prisoners are denied a right that ought to be theirs. But Mr. Perera, too, has rights that must be respected, and their Lordships are unable to find anything in his conduct that comes within the definition of contempt of court. That phrase has not lacked authoritative interpretation. There must be involved some " act done or writing published calculated to " bring a court or a judge of the court into contempt or to lower " his authority " or something " calculated to obstruct or interfere with the due course of justice or the lawful process of the " courts ": see *Reg.* v. *Gray* (12).

What has been done here is not at all that kind of thing. Mr. Perera was acting in good faith and in discharge of what he believed to be his duty as a member of the legislature. His information was inaccurate, but he made no public use of it, contenting himself with entering his comment in the appropriate instrument, the visitors' book, and writing to the responsible Minister. The words that he used made no direct reference to the court, or to any judge of the court, or, indeed, to the course of justice, or to the process of the courts. What he thought that he was protesting against was a prison regulation, and it was not until some time later that he learnt that, in so far as a petitioner had his petition dealt with in his absence, it was the procedure of the court, not the rules of the prison authorities, that brought this about. Finally, his criticism was honest criticism on a matter of public importance. When these and no other are the circumstances that attend the action complained of there cannot be contempt of court.

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(12) [1900] 2 Q. B. 36.

At the time of the hearing of the appeal the respondent had not entered an appearance. It was, however, brought to their Lordships' attention that there seemed to be some misunderstanding on the respondent's part as to the parties to the appeal. In the special circumstances they therefore gave a direction that, before tendering their advice to His Majesty, they would hear any representations that the respondent might wish to place before them, such representations to be confined to the question of costs. At an adjourned hearing the respondent appeared by counsel. Having taken into consideration what was urged before them, their Lordships have humbly advised His Majesty that the appeal should be allowed and the order of the Supreme Court of Ceylon dated July 25, 1950, set aside, any moneys paid by the appellant by way of fine to be repaid to him and the respondent to pay his costs (if any) of the proceedings in Ceylon. The respondent must pay the appellant's costs of the appeal, excluding any costs of the adjourned hearing.

Solicitors: *T. L. Wilson & Co.; Burchells.*

FUNG KAI SUN . . . . . . APPELLANT;

AND

CHAN FUI HING AND OTHERS . . . RESPONDENTS.

J. C.*
1951
June 4.

ON APPEAL FROM THE COURT OF APPEAL FOR HONG KONG.

Estoppel—Mortgage—Forgery—Delay in informing mortgagee—Duty of disclosure—Detriment.

The manager of certain real property belonging to the respondents fraudulently mortgaged it by means of forged mortgages to the appellant, whose first intimation that the mortgages were alleged to be forged was the service of the writ by the respondents in their action against him for a declaration that the mortgages were null and void and should be set aside. There had been no contractual or other relationship between the respondents and the appellant, and the former, after they became aware of the forgery, had, for their own purposes, delayed for about three weeks—until the issue of the writ—before informing the appellant of the forgery. By his defence the appellant alleged, inter alia, that the respondants' silence had deprived him of any opportunity of obtaining

* *Present*: LORD PORTER, LORD REID and SIR LIONEL LEACH.

J. C.
1951
Fung Kai Sun v. Chan Fui Hing.

restitution from the forger, and he claimed that they were therefore estopped from saying that the deeds were not executed by them.

Held, that the respondents were not entitled to withhold from the appellant information that his mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that the deeds were forged if by reason of their keeping silent the appellant had suffered detriment. The true test was whether the appellant's chance of recovering from the forger had been materially prejudiced by the delay. In the circumstances of the present case, however, the appellant had failed to establish that he had suffered such detriment by reason of the delay as would give rise to estoppel.

Ramsden v. *Dyson* (1866) L. R. 1 H. L. 129, 140; *Muir's Executors* v. *Craig's Trustees* 1913 S. C. 349, 355; *William Ewing & Co.* v. *Dominion Bank* [1904] A. C. 806; *Greenwood* v. *Martins Bank Ld.* [1933] A. C. 51, *Ogilvie* v. *West Australian Mortgage and Agency Corporation* [1896] A. C. 257 and *M'Kenzie* v. *British Linen Company* (1881) 6 App. Cas. 82, considered.

Judgment of the Full Court of the Supreme Court of Hong Kong (1949) 33 H. K. L. R. 142 affirmed in the result.

Appeal (No. 2 of 1950), by leave of the Supreme Court of Hong Kong, from a judgment of the Full Court (July 14, 1949) which had dismissed an appeal from a judgment of MacGregor, C.J. (December 19, 1940).

The facts as stated in the judgment of the Board were as follows:—The plaintiffs in this action and respondents in this appeal were tenants in common in equal shares of property at 300 Des Voeux Road Central, and 92 Wing Lok Street, Hong Kong. They acquired that property in 1925 and 1927, and until 1933 the title deeds were held, and the rents were collected, by a firm of which the second respondent was manager. In 1933 that firm ceased to carry on business and thereafter the title deeds were entrusted to Chan Chung Wah, a younger brother of the third respondent. Chan Chung Wah managed the property and remitted the rents and submitted accounts to the respondents. About the beginning of 1939 his remittances of rent fell in arrear, and in March or April of that year the second respondent asked a fellow clansman, Chan Kwok Shing, to look into the matter. He did so, but Chan Chung Wah put him off with excuses for a time; then he discovered that the tenants were no longer paying their rents to Chan Chung Wah but had for some time been paying their rents to a collector for a bank. He reported that to the second respondent on or about May 19, and the second respondent said that he then suspected that Chan Chung Wah had fraudulently mortgaged the property. On May 24 he wrote to the first respondent, who was not then in Hong Kong, and the first respondent arrived in Hong Kong on May 31 or June 1 and immediately went to see the second respondent about the matter. The second respondent said that by that time he knew that Chan Chung Wah had mortgaged the property by forged mortgages.

The first and second respondents decided to try to obtain payment from Chan Chung Wah of the sums which he owed to them before doing anything else. They refrained from giving any information about the forgery to the defendant and appellant, who was the holder of the forged mortgages, and they did not consult the third respondent as they thought that he might be involved in the forgery. The first respondent went several times to look for Chan Chung Wah, who had rooms in the property at 300 Des Voeux Road, but did not find him until June 10. He then succeeded in getting $100 from Chan Chung Wah with a promise to pay the rest of the debts immediately, but two days later Chan Chung Wah had disappeared. Little was known about his later movements. He was in Macao for a time, and once in the later part of 1939 he was seen by a witness in Hong Kong. No proceedings appeared to have been taken against him.

When the first and second respondents discovered that Chan Chung Wah, the forger, had disappeared, they decided to raise an action against the appellant. The writ of summons was dated June 17, 1939. Before it was served they told the third respondent about the position, and on June 21 the third respondent was added as a plaintiff. The respondents' claim was for a declaration that the two mortgages held by the appellant were not executed by the respondents and that those mortgages were null and void, for an order that those mortgages be set aside, and for rectification of the register in the Land Office. That writ was served on the appellant on June 23 and that was the first intimation to him that his mortgages were alleged to be forged. No further information was given to the appellant at that time. The appellant's main original defence was a denial that the mortgages were forged: he also pleaded that, if the deeds were executed by persons other than the respondents, they, by allowing those persons to have the custody or control of the documents of title, were estopped as against him from saying that the deeds were not executed by them. The appellant made no request to be told who had had the custody of the documents of title, but considerable correspondence passed on the question whether the appellant's witnesses, who had seen those who purported to be the mortgagors, could have facilities to identify the respondents. In the course of that correspondence, on November 20, 1949, the appellant was informed that Chan Chung Wah had had the titles in his possession, but he still maintained as his principal defence that his two mortgages were genuine documents which had been signed by the respondents.

The trial began on December 11, 1939. It soon became apparent from the evidence led that the mortgages were forgeries and that the original defence would fail. But it also appeared from the respondents' evidence that by May 24 the second respondent knew that the deeds were forged and knew, or at least strongly suspected, that Chan Chung Wah was the forger. The appellant then sought, and obtained, leave to amend his defence by adding a further defence to the effect that the respondents, by reason of their conduct in standing by with full knowledge from May 24, failing to inform the appellant of the forgery until June 23, and failing to disclose that Chan Chung Wah was the forger until December 11, were estopped from saying that the deeds were not executed by them. The appellant alleged that that keeping silent deprived him of any opportunity of obtaining restitution from Chan Chung Wah. That was the defence on which the appellant now relied.

MacGregor, C.J., gave judgment for the respondents for the declaration and consequential relief sought, with costs. On appeal the only part of the judgment of the trial judge which the appellant challenged was that which related to estoppel, and the Full Court (Sir Leslie Gibson, C.J., Williams and Scholes, JJ.) dismissed the appeal on the following grounds:—(a) That the respondents were under no duty to disclose the fact of the forgeries to the appellant; (b) that, even if such a duty existed, there was no duty to disclose the identity of the forger; and (c) that up to the time of the service of the writ the appellant had suffered no detriment arising from the respondents' non-disclosure.

1951. April 11, 12, 16 and 17. *Diplock, K.C.*, and *Rodger Winn* for the appellant. The question of law involved in this appeal is whether the respondents, on ascertaining that their signatures had been forged on a purported mortgage of their property to the appellant, owed any, and if so what, duty to the appellant to disclose the facts known to them. The facts are not now in dispute. By the end of May, 1939, both the first and second respondents knew that the mortgages had been forged and who had forged them. The service of the writ on the appellant on

June 23 was the first notice he had that there was anything wrong with the mortgages; it gave him no notice of who the forger was.

It is proper to infer from the facts of this case (a) that the respondents between May 24 and December 11, 1939, refrained from disclosing to the appellant the facts which would have enabled the forger of the mortgages to be identified; (b) that the appellant was thereby prevented from prosecuting any remedy against the forger at a time when the latter had property which could have been rendered available by attachment to meet the appellant's claim against him; and (c) that the appellant thereby lost any effective remedy against the forger. The respondents, when they discovered that the agent to whom they had entrusted their title deeds had used them to facilitate a fraud on the appellant by means of a forgery of the mortgages, ought reasonably to have foreseen that the appellant would be likely to be injured by their omission to disclose the forgeries and the identity of the forger.

In the circumstances of the case the respondents owed a duty to the appellant to disclose the forgeries and the identity of the forger, and the appellant has been injured by their breach of that duty. The respondents are therefore estopped from alleging that the mortgages are forged or otherwise invalid. The requisites of estoppel applicable are as stated by Lord Tomlin in *Greenwood* v. *Martins Bank Ld.* (1): (A) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (B) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made. (C) Detriment to such person as a consequence of the act or omission. Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation.

Lord Tomlin was following the words of Parke, B., on estoppel in *Freeman* v. *Cooke* (2). There is here, first, the omission by the first and second respondents to disclose the fact of the forgeries until June 23, and the omission of all three respondents to disclose the identity of the forger until December 11, 1939. Secondly, the original failure of the first and second respondents to disclose was avowedly with the intention of getting their arrears of rent first, that is to say, of preventing the appellant from exercising any remedy himself. The result of that omission was that the appellant was unable to take any effective steps to exercise his

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(1) [1933] A. C. 51, 57.

(2) (1848) 2 Ex. 654, 663.

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remedy against the property of the forger in Hong Kong which would have been available to him under the Hong Kong Civil Procedure Code if he had known the identity of the forger. Finally, there is a detriment, namely, the loss of his remedy as respects the property of the forger.

The principal question, therefore, is whether there was any duty on the respondents to disclose to the appellant their knowledge of the forgeries. Authorities which bear on the question whether there was such a duty are *Davis* v. *Bank of England* (3), *M'Kenzie* v. *British Linen Co.* (4), *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (5) and *Dominion Bank* v. *Ewing* (6). A petition for special leave to appeal to the Judicial Committee of the Privy Council in the last-cited case was dismissed (7), and that was the only report of the case before the Hong Kong court in the present case. Up to that date, 1904, the relationship of banker and customer or some other relationship was clearly not regarded as essential to a duty to disclose; it was all on a wide basis. Admittedly, all the circumstances have to be considered. The last of the "bank" cases is *Greenwood* v. *Martins Bank Ld.* (8).

It is submitted that the bank cases are no authority for the proposition that the duty only exists where there is a relationship of banker and customer, or for the proposition that the duty only exists in relation to negotiable instruments. Nor are they any authority for the proposition that the duty only exists when the person holding the forged instrument has intimated the fact that he holds such an instrument to the person whose signature is forged. The duty is a duty towards one's neighbour, as in *Donoghue* v. *Stevenson* (9). A duty of disclosure is owed by a person whose signature to an instrument is forged to any person whom he can reasonably foresee may on the faith of the validity of the instrument act to his detriment or lose a remedy against the forger. That proposition is merely putting in other words what Lord Watson said in *M'Kenzie's* case (10). Another example of that general principle is *Ramsden* v. *Dyson* (11), where it was said: "If a stranger begins to build on my land supposing it to "be his own, and I, perceiving his mistake, abstain from setting

(3) (1824) 2 Bing. 393, 399, 409.
(4) (1881) 6 App. Cas. 82, 98, 108.
(5) [1896] A. C. 257, 267.
(6) (1904) 7 O. L. R. 90; (1904) 35 S. C. R. (Can.) 133.
(7) [1904] A. C. 806.
(8) [1932] 1 K. B. 371, 383; [1933] A. C. 51, 57.
(9) [1932] A. C. 562.
(10) 6 App. Cas. 82.
(11) (1866) L. R. 1 H. L. 129, 140.

"him right, and leave him to persevere in his error, a court of "equity will not allow me afterwards to assert my title to the "land on which he had expended money on the supposition that "the land was his own". It is the same sort of duty to my neighbour as was discussed in *Donoghue* v. *Stevenson* (12), and on which it is sought to found the present case. And in *Bourhill* v. *Young* (13) Lord Russell of Killowen said that: "In considering whether a person owes to another a duty a breach of "which will render him liable to that other in damages for "negligence, it is material to consider what the defendant ought "to have contemplated as a reasonable man". Here there can be no question that any reasonable man would have known that the appellant would be affected by the failure to disclose the forgeries. The respondents did in fact know, and they acted as they did with the object of getting their remedy for rent arrears against the forger before he got his property away. The problem is the old one of which of two innocent persons shall suffer for the wrong of a third.

If there was a duty to disclose at all, it was a duty to disclose all those facts known to the respondents which would have enabled the appellant to avoid acting to his detriment or losing a remedy against the forger. If it is shown that there is a duty, then it is for the respondents to show that they are absolved from that duty by some other fact. They have not done so. It is the duty which gives rise to the estoppel.

Manningham-Buller, *K.C.*, and *King Anningson* for the respondents. This case falls into two parts on the facts: the periods from May 24 to June 23, and from June 23 to December 11, when the appellant knew of the identity of the forger from the respondents. It is submitted first that the respondents were in the circumstances of this case under no legal duty to disclose the forgeries to the appellant. Secondly, if they were under any duty to disclose the forgeries, that duty was discharged by the issue of the writ, and the appellant suffered no detriment before the issue of the writ, and therefore down to that time there was not any estoppel. Thirdly, if there was a duty to disclose the forgeries, there was no duty whatsoever resting on the respondents to go further than that and to disclose the identity of the alleged forger. Lastly, if there was a duty to disclose the identity of the forger, there is no proof that the appellant suffered detriment in consequence of the non-performance of that duty. The authorities

(12) [1932] A. C. 562.

(13) [1943] A. C. 92, 101.

show that it must be established that the detriment is due to, and caused by, the omission to fulfil the duty. There was no evidence to establish that the appellant did not long before December 11 know, or have strong grounds for suspecting, the identity of the forger without being told by the respondents. The onus lies on the person who is seeking to set up estoppel. There is the further question as to what constitutes a detriment. In some of the cases that is referred to specifically as the loss of a cause of action. Here there has been no loss of a right of action. Without proof of the detriment, a direct consequence of the omission, there can be no estoppel by silence; and there can be no estoppel by silence without proof of conduct amounting to a representation intended, in the words of most of the authorities, to induce a course of conduct.

The issue of the writ was a clear and unequivocal notice of the forgeries. Whether or not there was a duty on the respondents to disclose the forgeries or the identity of the forger, there cannot be any estoppel before the date of the service of the writ because in fact no detriment was suffered. There are two categories into which the various cases on estoppel can be divided: first, the category where an invasion of a person's rights is in progress and some representation is made either by words or conduct; and secondly, where the invasion of his rights has been completed and no action was taken by him—he did nothing. Although *De Bussche* v. *Alt* (14) was decided in 1878, there is still a very valid distinction to be drawn between the two categories.

All the cases referred to for the appellant concerned negotiable instruments; he has not been able to cite a single instance in relation to a signature on any other class of document, and that is not without significance: Halsbury's Laws of England (2nd ed.), vol. 1, p. 837. In either of the two categories—where the invasion of rights is in progress or has been completed—in order to constitute an estoppel the first essential is that there must be a representation either by words or conduct: *Freeman* v. *Cooke* (15); *Pickard* v. *Sears* (16)—they were both cases which fell within the first category, namely, where the invasion of rights was in progress. It would appear that it was only later that the doctrine came to be applied to the cases of estoppel falling in the second category, where the invasion of the rights had been completed.

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(14) (1878) 8 Ch. D. 286, 314.

(15) 2 Ex. 654.

(16) (1837) 6 A. & E. 469, 474.

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So far as can be ascertained, the cases where it has fallen into that category all relate to negotiable instruments—the only cases which were cited for the appellant—and apart from *Ewing's* case (17), which was a Canadian case, appear to be the only cases in which silence after completion of a transaction has been held to amount to an estoppel if the other conditions of an estoppel are satisfied. The second essential of estoppel is that it must be of an existing fact, not of a mere intention: *Jorden and Wife* v. *Money* (18); *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (19); *Chadwick* v. *Manning* (20); and there are other cases in support of that proposition referred to in Halsbury's Laws of England (2nd ed.), vol. 13, p. 471.

What constitutes an estoppel is correctly stated in *Carr* v. *London and North Western Ry. Co.* (21). It was said in *Proctor* v. *Bennis* (22) that there was no duty to speak to prevent an infringement of the patent. Whether there is a representation by words or by conduct is in each case solely a question of fact: *M'Kenzie's* case (23). The proper test is that of Lord Tomlin in *Greenwood's* case (24), that silence, when there is a duty to speak, may amount to a representation. [Reference was also made to Spencer Bower on Estoppel by Representation (1923 ed.), p. 79, para. 94; and to *M'Kenzie's* case (23); *Ogilvie's* case (25); *Ewing's* case (26) and *Greenwood's* case in the Court of Appeal (27).] If there was resting on the respondents a duty to speak, and their failure to do so amounted to a representation, then once they had spoken by the issue of the writ there was in this case no representation by conduct by not identifying the forger. There was no conduct by the respondents after June 23 which represented in any way contrary to what they sought to establish at the hearing, namely, that the mortgages were forgeries.

The respondents go further, and say that in this case there was no duty to speak. They and the appellant were complete strangers; there was no evidence of any business transactions between them: *Barton* v. *London and North Western Ry. Co.* (28); *Jones Brothers (Holloway) Ld.* v. *Woodhouse* (29);

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(17) 35 S. C. R. (Can.) 133.
(18) (1854) 5 H. L. C. 185.
(19) (1873) L. R. 6 H. L. 352, 360.
(20) [1896] A. C. 231.
(21) (1875) L. R. 10 C. P. 307, 316–7.
(22) (1887) 36 Ch. D. 740, 761.
(23) 6 App. Cas. 82.
(24) [1933] A. C. 51, 57.
(25) [1896] A. C. 257.
(26) [1904] A. C. 806.
(27) [1932] 1 K. B. 371, 383.
(28) (1890) 24 Q. B. D. 77.
(29) [1923] 2 K. B. 117, 124.

Willmott v. *Barber* (30). Again, in *Refuge Assurance Co. Ld.* v. *Pearlberg* (31) it was held that there was no duty to speak. It is said in Halsbury's Laws of England (2nd ed.), vol. 13, p. 496, that " a duty to speak arises whenever a person knows " that another is acting on an erroneous assumption of some " authority given or liability undertaken by the former, or is " dealing with or acquiring an interest in property in ignorance " of his title to it ", and *Stroud* v. *Stroud* (32) is relied on for that proposition. It is submitted that that case is no authority for that very wide proposition, which is unduly wide in view of the other authorities to which reference has been made. [Reference was also made to Spencer Bower on Estoppel by Representation (1923 ed.), p. 66, paras. 83, 84 and 85.] *Donoghue* v. *Stevenson* (33) was commented on in *Candler* v. *Crane, Christmas & Co.* (34), from which it is clear that the Court of Appeal took the view that the principle laid down by Lord Atkin in *Donoghue's* case (33) is limited in its application to cases where a physical injury is sustained.

It all comes back to the questions, was there a representation, and, if so, what was the representation? There can be no representation by silence unless there exists a duty to speak. To hold that the respondents were under a duty to speak in the circumstances of this case is to go very considerably beyond any authority previously cited. Reliance is also placed on *Imperial Bank of Canada* v. *Begley* (35).

Next, if it has been proved that there was representation, and that it was acted on, it must then be shown that there has been detriment. It was said that it is enough to prove detriment if it can be shown that the appellant was prevented from obtaining a charge on the forger's assets. That is not enough. To found estoppel it must be established either that the appellant changed his position in consequence of the representation, or lost a remedy, or suffered damage. The evidence here falls far short of that. *Dixon* v. *Kennaway & Co.* (36) bears materially on this point. The burden of proof of all the conditions necessary to constitute estoppel rests on the appellant: Spencer Bower on Estoppel, paras. 71, 137. There was no proof here of any detriment, and if there was any detriment suffered after June 23 it

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(30) (1880) 15 Ch. D. 96, 105.
(31) [1938] 2 All E. R. 25.
(32) (1844) 7 Man. & G. 417.
(33) [1932] A. C. 562.
(34) [1951] 2 K. B. 164.
(35) [1936] 2 All E. R. 367, 373.
(36) [1900] 1 Ch. 833, 839.

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was not due to any representation by conduct made by the respondents.

To summarize: it has not been established that in the circumstances of this case there was any legal duty resting on the respondents to speak. There is no authority for the proposition that in this case directly they became aware of the existence of the forged mortgage deeds they were then—and that is the important point of time—under a duty to disclose to the mortgagee that the deeds were forgeries. Only if there was a duty to speak can there have been a representation by silence; even then, there can only be a representation by silence for the period from May 24 to June 23. There is no evidence that the appellant was in any way affected by the respondents' silence up to June 23, and no evidence of any detriment suffered by him. Then on June 23 the respondents made full disclosure, when they issued the writ, that the mortgages were forgeries. There was no evidence that the appellant was actuated by any representation after June 23, and no proof that he suffered any damage.

Diplock, *K.C.*, in reply, reviewed the authorities previously cited. A duty of disclosure is owed by a person who knows that his signature to an instrument conferring a right has been forged to any person whom he can reasonably foresee may on the faith of the instrument act to his detriment or lose a remedy against the forger. A person has a right not to be misled by his neighbour into acting to his detriment: that right may give various remedies, including a right to rely on estoppel. The duty to disclose includes a duty to disclose the identity of the forger; it is conceded that there is no authority for that proposition. Between June 1 and June 23 there was sufficient detriment to constitute estoppel.

June 4. The judgment of their Lordships was delivered by LORD REID, who stated the facts set out above and continued:— Several witnesses say that Chan Chung Wah had been known to them for a considerable time under the name of Chan Kwok Nim, which is the name of his brother, the third respondent. In Hong Kong mortgages are registered, and to effect registration the mortgagors have to appear and be identified. In this case this safeguard was wholly ineffective. Chan Chung Wah succeeded in registering three forged mortgages without any suspicion being aroused. The first, in favour of the Overseas Chinese Bank, was registered in 1935: the sum due to the bank was later repaid to them by Chan Chung Wah and no question arises in this case about this mortgage. The second mortgage was in favour of the appellant for $55,000, dated October 29, 1937, and the third, also in favour of the appellant, was for $5,000 and was dated November 2, 1938. In each case Chan Chung Wah's method was the same. He approached some man who had known him as Chan Kwok Nim and introduced two strangers to this man as Chan Fui Hing and Chan Sik Tin, the first and second respondents and co-owners of the mortgaged property with Chan Kwok Nim. This man then purported to identify Chan Chung Wah and the two strangers as Chan Kwok Nim, Chan Fui Hing and Chan Sik Tin, and the forged mortgage which they presented was accepted and registered. Their Lordships regard it as extremely unfortunate that this laxity should have been possible, but there is no suggestion that the appellant or any of the respondents were in any way to blame or that the forgeries ought to have been discovered at any earlier date.

It is clear that the first and second respondents knew by the end of May that the appellant held mortgages for $60,000 over their property which bore to be signed by them but which were in fact forgeries, and they must have known that the appellant believed these mortgages to be genuine. But in order to benefit themselves they deliberately refrained from informing the appellant that his mortgages were forged until June 23. By that time the forger had disappeared. It is not proved that the appellant would have been in any better position to recover anything from the forger at the end of May than he was immediately after June 23, but it was argued for the appellant that the respondents had a duty to inform the appellant immediately they discovered the forgery, that if the appellant had been told in time he might have taken some action against the forger while he could still be found in Hong Kong, and that the respondents' delay in fulfilling their duty, having deprived the appellant of an opportunity to take action against the forger while he could still be found, must result in the respondents being now estopped from pleading the forgery against the appellant. This argument raises two questions; first, whether the respondents had any duty to inform the appellant of the forgery, and, secondly, if they had such a duty, whether their delay in informing him caused detriment to him so that they are now estopped from asserting against him that the deeds are forged. If it were held that the circumstances create an estoppel a third question would arise—whether that estoppel would only affect the first and second respondents, who were aware of the true facts from May 31, or whether it could also affect the third respondent, who is only proved to have become aware of the facts immediately before information was given to the appellant by service of the writ.

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It was argued for the respondents that they were under no duty to volunteer information to the appellant, and that, as they never said or did anything which misled the appellant, they cannot now be prevented by mere delay from asserting the truth about the deeds. It was said that as there was no contractual or other relationship between the respondents and the appellant there could be no duty to volunteer information. It is quite true that there was no duty in the sense that failure to perform it would be a tort or a ground for an action of damages. But it is well established that silence can in some cases give rise to estoppel without there having been a duty in that sense: one example is given by Lord Cranworth, L.C., in *Ramsden* v. *Dyson* (37): " If a stranger begins to build on my land supposing " it to be his own, and I, perceiving his mistake, abstain from " setting him right, and leave him to persevere in his error, a " court of equity will not allow me afterwards to assert my title " to the land on which he had expended money on the supposi- " tion that the land was his own. It considers that, when I saw " the mistake into which he had fallen, it was my duty to be " active and to state my adverse title; and that it would be " dishonest in me to remain wilfully passive on such an occasion " in order afterwards to profit by the mistake which I might have " prevented ".

The question in this case is whether any duty of that kind arises when a person learns that another person is holding and relying on a forged deed which bears to be signed by him. It is unnecessary to enter on any general consideration of the basis of this kind of duty because there is cogent authority in favour of there being a duty of this kind on a person who becomes aware that another person holds a forged deed which purports to be signed by him, and there does not appear to be any direct authority to the contrary effect. In *M'Kenzie* v. *British Linen Co.* (38), the bank had informed M'Kenzie on July 14, 1879, that they held his bill due on July 17, and when the bill was dishonoured they pressed him for payment; but he kept silent until July 29, when he informed the bank that his signature was forged. It was held that M'Kenzie had not by his silence adopted the bill. It was not suggested that there had been any change in

(37) L. R. 1 H. L. 129, 140.

(38) 6 App. Cas. 82.

the bank's position between July 17 and 29, and it was held that M'Kenzie was not barred or estopped from asserting the forgery.

A statement of the law directly in point in the present case is to be found in the speech of Lord Watson (39): "In the present "case the inference which has been drawn by the court below, "adversely to the appellant, appears to depend upon the fact that "after he came to know in July that the second bill had been "discounted with the bank, he (the appellant) kept silence, or at "least did not inform the bank of the forgery of his own name "until a fortnight or thereby had elapsed. The only reasonable "rule which I can conceive to be applicable in such circumstances "is that which is expressed in carefully chosen language by Lord "Wensleydale in the case of *Freeman* v. *Cooke* (40). It would "be a most unreasonable thing to permit a man who knew the "bank were relying upon his forged signature to a bill to lie by "and not to divulge the fact until he saw that the position of "the bank was altered for the worse. But it appears to me that "it would be equally contrary to justice to hold him responsible "for the bill because he did not tell the bank of the forgery at "once, if he did actually give the information, and if when he did "so the bank was in no worse position than it was at the time "when it was first within his power to give the information".

There was not in *M'Kenzie's* case (39) any contractual or other relationship between him and the bank, and the only distinction between that case and the present case is that the document in *M'Kenzie's* case (39) was a negotiable instrument whereas here it is a mortgage. It was argued for the respondents that this distinction is material, but their Lordships are unable to find any good reason for so regarding it. No later case was cited in which any doubt was thrown on the authority of the passage which has been quoted, or any limitation of its scope suggested.

In *Muir's Executors* v. *Craig's Trustees* (41), a case which dealt with a forged bond over property, Lord Dunedin (then Lord President of the Court of Session) after referring to *Freeman* v. *Cooke* (40) and *M'Kenzie's* case (39) said (42): "When you "know there is a forgery and when you know that the person "relying upon that forgery is putting himself in a worse position "or losing some remedy which he would otherwise have, you are "not entitled to keep silence and then to tell him at the end of

(39) 6 App. Cas. 82, 109.
(40) 2 Ex. 654.
(41) 1913 S. C. 349.
(42) Ibid. 355.

" the day, after his position has been made worse by the delay, " that the signature is forged ". Another case in which there was no previous relationship between the person holding the forged document and the person whose signature had been forged is *William Ewing & Co.* v. *Dominion Bank* (43). In that case a promissory note was forged and handed by the forger to the bank. The bank informed Ewing & Co., whose name had been forged, that they held the note, and Ewing & Co. delayed to inform the bank of the forgery. During this delay the bank paid out money to the forger. The Supreme Court of Canada by a majority held that the company were estopped from denying their signature (44). On a petition for special leave to appeal to His Majesty in Council leave was refused by their Lordships for reasons given by Lord Davey. He said (45): " Messrs. Ewing, " wishing apparently to screen Wallace [the forger], did not give " the bank any information that the note was forged, and they " must have known that their withholding such information from " the bank would entitle the bank to believe that the note was " a genuine note of Messrs. Ewing themselves. Whether the " circumstances were such as would raise either an estoppel " against the petitioners, or would amount to what Lord Blackburn in *M'Kenzie* v. *British Linen Co.* (46) calls a ' ratification " ' for a time ' by the supposed makers of the note of their " signature, is, in the opinion of their Lordships, absolutely a " question of fact. They cannot see that any important question " of law is really at stake ". Their Lordships now find it difficult to see how that could have been said if their Lordships in *Ewing's* case (43) had thought that there was any ground for holding that a person who learns that a stranger is holding a document purporting to be signed by him is entitled in all cases to keep silent and will not be estopped from denying his signature although his silence causes detriment to the holder of the document.

In their Lordships' judgment it must be held that the respondents were not entitled to withhold from the appellant information that the appellant's mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that these deeds were forged if by reason of their keeping silent the appellant suffered detriment. Accordingly, the next question for consideration is whether the respondents, having delayed from June 1 to June 23 to inform the appellant that his mortgages were forgeries, caused any such detriment to the appellant as will now give rise to estoppel. The only detriment suggested is that if the appellant had been informed on or about June 1 he might have been able to take some more effective action to minimize his loss than it was possible for him to take after June 23, and the only action which he could have taken would have been action against the forger or his property. The forger, Chan Chung Wah, had real property in Hong Kong of substantial value, but there is no evidence that this was less available to the appellant after June 23 than it had been before. It is true that Chan Chung Wah disappeared about June 10, but Sir L. Gibson, C.J., states in his judgment "it was still open to the appellant "to take proceedings under chapter XVII of the Code of Civil "Procedure. It is clear from the case of *Sing Tak Bank* v. *Chau* "*Tung Shan* (47) that it would not have been necessary to serve "a writ of summons before applying for the writ of attachment. "There is no indication that proceedings taken under that chapter, "if the appellant had been in a position to take them, would "have been any less effective than proceedings taken when "respondents first heard of the forgery".

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(43) [1904] A. C. 806.

(44) (1904) 35 S. C. R. (Can.) 133.

(45) [1904] A. C. 807.

(46) 6 App. Cas. 82.

This statement of the law was not challenged by the appellant, so the delay cannot be held to have caused any detriment to the appellant by reason of the loss of any opportunity to attach the forger's real property. There is no evidence that the forger had any personal property which the appellant could have recovered if he had taken action immediately after June 1, and, moreover, there is no reason to suppose that the appellant would have taken any action at all if he had been told of the forgery on June 1. When he was told on June 23 he made no attempt even to discover who the forger was because he relied on his defence that the deeds were genuine, and there is nothing in the record to suggest that the appellant would have acted differently if he had been told on June 1 instead of on June 23. The appellant can therefore only have suffered detriment by reason of this delay on the suppositions, first, that if he had been told on June 1 his attitude would have been different from his attitude when he was told on June 23, and, secondly, that if he had taken action on June 1 there was something which he could have recovered then but which he could not have recovered after June 23. Nevertheless it was argued that even so there is a sufficient foundation for estoppel.

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(47) (1905) 1 H. K. L. R. 27, 28.

The authorities chiefly relied on were *Greenwood* v. *Martins Bank Ld.* (48) and *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (49). In *Greenwood's* case (48) a wife had forged her husband's name on cheques and thereby obtained money from the bank. When the husband discovered this he refrained for several months from informing the bank of the forgery. Then he determined to tell the bank and the wife committed suicide. The husband then brought an action against the bank to recover the sums paid by the bank out of his account on the forged cheques, but it was held that the bank had suffered sufficient detriment by reason of the delay to enable them to plead estoppel. If the bank had been able to raise an action while the wife was alive they could have sued the husband for his wife's tort, but this remedy was no longer available after her death. If the husband had told the bank sooner the wife might have committed suicide then, and if she had done so the bank would have been no better off than they were later. But there could be no certainty that the wife would have committed suicide if circumstances had been different, and as the bank would have been able to avoid loss if she had not, they lost by the delay a chance of defeating the husband's claim. This was held sufficient detriment to enable them to plead estoppel. In *Ogilvie's* case (49) a customer of the bank was informed by the bank's agent that a clerk in the bank's employment had forged his name to certain cheques which had been paid out of his account, but he was told by the bank's agent that it was in the bank's interest that he should delay raising the matter for a time. He believed the agent and allowed some time to elapse, during which time the forger left the colony. When he raised an action against the bank for the money which had been paid out of his account on the forged cheques he was met by a plea of estoppel. It was held that in the circumstances he was entitled to keep silence, and therefore there was no estoppel.

However, in delivering their Lordships' judgment, Lord Watson went on to make certain observations as to what the position would have been if the customer by keeping silence had violated his duty to the bank. He said (50): " If the true " import of the previous findings had been that, by keeping silence " and allowing the forger to escape from the colony and the juris- " diction of its courts, the appellant had violated his duty to the

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(48) [1933] A. C. 51.
(49) [1896] A. C. 257.
(50) Ibid. 270.

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"bank, their Lordships are of opinion that these circumstances "would in themselves have been sufficient to show prejudice "entitling the bank to have their plea of estoppel sustained to its "full extent". Taken by itself, this passage would appear to indicate that the mere fact that the forger had escaped was enough even if it were clear that the bank would have recovered nothing from him in any event. But their Lordships doubt whether that was intended, because in an earlier passage dealing with *M'Kenzie's* case (51) and similar cases, Lord Watson said (52): "The ground upon which the plea of estoppel rested in these "cases was the fact that the customer, being in the exclusive "knowledge of the forgery, withheld that knowledge from the "bank until its chance of recovering from the forger had been "materially prejudiced".

In their Lordships' judgment this is the true test: the chance of recovering must have been materially prejudiced by the delay. In the present case their Lordships are of opinion that the appellant has not shown that he was materially prejudiced by the delay. The appellant took no action when he was told of the forgery, and he did not give evidence in this case. In the absence of any explanation from him, and the whole trend of the evidence being to show that he would not have taken any action even if he had been told of the forgery earlier, their Lordships are not prepared to assume that he might have done so, and it is only on that assumption that he can have suffered any possible prejudice by the delay. Their Lordships therefore hold that no estoppel arises from the respondents having delayed to inform the appellant that his mortgages were forged.

Finally the appellant argued that when the respondents discovered the true facts it was not enough for them to disclose to him that the mortgages were forgeries; as they knew who the forger was they were under a duty to give him that information also, and if they failed to do so to his detriment they must on that account now be estopped from maintaining that the mortgages are forgeries. It was said that the purpose of requiring prompt information of the forgery to be given is to enable the person who holds the forged document to recover as much as possible of what he has lost by proceeding at once against the forger, and therefore where there is any duty to speak it must be a duty to give all information in the informant's possession which

(51) 6 App. Cas. 82.

(52) [1896] A. C. 268.

will assist the person holding the forged document to work out his remedy against the forger.

In their Lordships' judgment this argument is based on a misconception of the nature of estoppel. The question is whether the respondents are to be estopped from proving one particular fact—that the appellant's mortgages are not their deeds—and the reason why a person is estopped from proving a particular fact is that instead of disclosing it when he ought to have done so he concealed it or made some misrepresentation about it. He cannot now be heard to say something which he ought to have said sooner. But their Lordships can find neither principle nor authority to support the proposition that although one party may have clearly stated to the other at the right time the fact which he now wishes to prove, yet he will be estopped from continuing to assert that fact because he has withheld some other information which it was in his power to give. The respondents asserted in June that the appellant's mortgages were not their deeds; they were not then estopped from asserting that fact and they cannot now be estopped from continuing to assert it.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

Solicitors: *Stephenson, Harwood & Tatham; Reid Sharman & Co.*

[HOUSE OF LORDS.]

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Jan. 15, 16;
Mar. 1.

READING . . . . APPELLANT;

AND

ATTORNEY-GENERAL . . . . . . RESPONDENT.

Master and Servant—Servant of the Crown—Military law—Uniformed soldier—Presence on civilian lorry with illicit cargo—Money reward—Confiscation by military authorities—Court-martial conviction—Conduct prejudicial to good order and military discipline—Claim to recover money—Petition of right—Relation of Crown to soldier.

A sergeant in the British Army on active service abroad consented on several occasions to accompany civilian lorries transporting

**Present:* VISCOUNT JOWITT, L.C., LORD PORTER, LORD NORMAND, LORD OAKSEY and LORD RADCLIFFE.

illicit spirits to specified destinations. He always wore military uniform in order to avoid inspection of them by the police, and for his services he received in all 20,000*l*. The military authorities took possession of several thousand pounds found in his hands, and he was tried by court-martial and convicted of conduct prejudicial to good order and military discipline. After his release from prison he claimed, by petition of right, the return of the amount seized.

Held, that he could not recover the money.

Per Viscount Jowitt, L.C., and Lord Porter. The official position held by this soldier, which enabled him to earn the money by its use, gave the Crown, his master, the right to the money so earned as money had and received, even though it was earned by a criminal act and even though the Crown suffered no loss. The Crown was also entitled to the money on the separate and independent ground that a fiduciary relationship existed between the soldier and it.

Per Lord Normand. The soldier owed a fiduciary duty to the Crown and profits gained by him by the use or abuse of his military status were recoverable by it. *Quære* whether the Crown could have recovered on the footing of money had and received.

Per Lord Oaksey. An implied promise was to be imputed to the soldier that he would account to his master, the Crown, for any moneys he might receive by the use of his master's property and of his position as his master's servant, and he was no less accountable if the profits arose out of corrupt transactions.

Decision of the Court of Appeal (sub nom. *Reading* v. *The King* [1949] 2 K. B. 233) affirmed.

APPEAL from the Court of Appeal (Tucker, Asquith and Singleton, L.JJ.).

The facts, stated by LORD PORTER, were as follows:—In 1944 and 1945 certain sums, all in Egyptian currency, amounting in all to E18,842.105*l*., equivalent to 19,325*l*. 4*s*. 8*d*. in sterling, and held by or on behalf of the appellant, then a member of the armed forces of the Crown, were seized and taken into possession on behalf of His Majesty. By petition of right presented on November 1, 1946, he sought to recover these sums or their sterling equivalent (allowance being made for sums released to him for the purposes of his legal expenses), as money had and received by His Majesty to his use. The Crown admitted that these sums had been seized and taken into possession on behalf of His Majesty but alleged that they represented part of the proceeds of bribery "for accompanying . . . a loaded lorry in "and about Cairo whilst dressed in uniform and thereby falsely "representing himself as acting in the course of his military "duties . . . in order to avoid police inspection of the said lorry" and that the appellant was accountable therefor to His Majesty and received and held them in trust for His Majesty. Alternatively it was claimed that the Crown was entitled to set them off against the appellant's claim.

The facts proved or agreed in the action were not in dispute and were set out in the appellant's printed case and in his statement to the military authorities.

In 1943 and 1944 the appellant was a sergeant in the Royal Army Medical Corps and was receiving pay at the rate appropriate to his rank. He was employed as a sergeant in charge of medical stores at No. 63 General Hospital, Cairo.

On March 14, 1944, he dictated and signed a statement to Lieutenant Brooks of the Special Investigation Branch, Middle East, that he had received in all some 20,000*l.* from a man named Manole in the circumstances therein related:—At some time about the beginning of 1943, when having coffee at Alexandria whilst on leave, he was asked by a man, who apparently knew him, whether he would assist in selling cases of whisky and brandy to agents in Cairo for which he would get a few pounds. He was told that someone would get into contact with him outside the hospital gates at Helmeih. About a month later Manole met him there, told him a lorry was coming at a specified time to a place which was pointed out to him. When it arrived he was to board it and take it to another spot indicated. At the specified time and place a lorry duly arrived, the appellant then boarded it and conducted it through Cairo to the appointed spot, where the contents were transferred to another lorry but he was unable to see of what they consisted. He then went home, but by arrangement met Manole later on the same day at a restaurant in Cairo and received from him an envelope which on examination was found to contain 2,000*l.* This process was repeated on a number of occasions on which, as in the first, a lorry arrived with cases the contents of which were undisclosed, and after each journey he was given sums varying from 1,000*l.* to 4,000*l.*

On March 20, 1944, his statement was shown to the appellant by Sergeant-Major Jones of the Special Investigation Branch, and he acknowledged that it was his statement and that it was true. He also told Sergeant-Major Jones that he had been dressed on each occasion in uniform, and on a later occasion showed Corporal Read of the Special Investigation Branch a number of different places in Cairo as points at which he had met or left the lorries which he had accompanied from time to time. In his printed case he also alleged that at all material times it was obligatory for all service personnel in Cairo to wear uniform, except when engaged in sport or other specially excepted activity, but there was no evidence to this effect.

In November, 1944, the appellant was tried by court-martial under s. 40 of the Army Act, charged with conduct to the prejudice of good order and military discipline, found guilty and sentenced to be reduced to the ranks and to undergo two years' imprisonment.

Denning, J., dismissed the claim in the petition. The appellant appealed and the Court of Appeal by an order dated May 19, 1949, affirmed the judgment, ordering the appeal to be dismissed with costs to be paid by the appellant to the Crown or its solicitor, such costs to be taxed by a taxing master. The appellant appealed to the House of Lords.

Cyril Salmon, *K.C.*, *Pearson*, *K.C.*, and *Cassel* for the appellant. The question is this: in what circumstances, if any, does the law allow a master to take advantage of his servant's crime by giving him a legally enforceable right to the proceeds of that crime? The appellant's case is admittedly devoid of merit but the courts are reluctant to adjudicate on the destination of the proceeds of a crime. The only way in which the appellant can be deprived of those proceeds is by allowing the claim of the Crown. In this particular case no harm would be done if he were so deprived but such a decision would have far-reaching results in the cases of other masters and servants. The Crown can only succeed here by a distortion of the law.

A servant who makes a secret profit or takes a bribe in or about his master's business must account for it to his master. The cases in this class were considered in *Regal* (*Hastings*) *Ld.* v. *Gulliver* (1). They have three factors in common which are absent from the present case:—(a) the servant, when he receives the money, must be in his master's business acting within the scope of his employment; (b) he must be acting in a fiduciary capacity; (c) the business of the master in which he is acting must be legitimate business. It cannot be said that this man on an illicit adventure was on his master's business or acting within the scope of his employment. Nor was he acting in a fiduciary capacity for his master. Also the business he was about was illegal.

Though it is undesirable that the man should keep the proceeds, it is hard to see why the master should get them, for

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(1) [1942] 1 All E. R. 378

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the Crown is claiming, not qua Crown, but as employer. <To alter the law so as to give masters a right to share in the fruits of their servants' crimes would have serious consequences> The position may be clarified by examples: B is the driver of A's van taking part in a black market adventure common to both of them, and B (as often happens in such cases) is convicted while A is not, the police being unable to obtain sufficient evidence against him, then, on the Crown's contention, A could claim any proceeds of the crime from B. Similarly, in the case of a "smash and "grab" raid, where a chauffeur, wearing his master's uniform, drives the car for the raiders and receives a fee for his part in the adventure, the master could claim the fee. Again, if a cabinet maker, using his master's tools for housebreaking with a gang, received a fee, his master, according to the Crown's contention, would have a claim to the fee. <There is not a single reported case in which it has been held that a master is entitled to claim a share in the proceeds of his servant's crime. It is true that if the servant, whilst on his master's business, takes a bribe, this is returnable to the master. But here the criminality is not confined to the reception of a bribe but extends to taking part in a criminal adventure>

In the present case the position would have been different if the appellant had taken a bribe to look the other way while army stores of which he was in charge were being stolen. The appellant was off duty at the time of the adventure, and accordingly was not about his master's business. A soldier stationed in Cairo, as was the appellant, cannot be said to be on duty when he is, say, out walking or at the cinema. When a servant uses his master's property without being engaged on his master's business the master is not liable for damage caused by him and so cannot claim any profit that may arise.

Further, the appellant was not at the time of this transaction in a fiduciary capacity vis-à-vis the Crown. Though in a sense a soldier is entrusted with his uniform for the benefit of his master the Crown, that is so only in a secondary sense and it is primarily for his own benefit. This is not the same as the case of a captain entrusted with a ship for the purpose of making a profit for his master: see *Shallcross* v. *Oldham* (2).

The basis of the case against the appellant is that he abused his position as a soldier, selling the use of assets which he possessed solely as a servant of the Crown. But in such a case

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(2) (1862) 2 J. & H. 609.

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as this the court will not spell out of the facts an equitable debt as in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3); it will not imply a contract to hand over moneys which, if express, would have been void as illegal or contrary to public policy. If the master had made such an express contract he would be affirming or adopting his servant's crime. Asquith, L.J., seeks to avoid this difficulty by imputing the promise to a point of time after the receipt of the bribe, but this is contrary to authority. In a claim for money had and received one cannot separate the receipt of the money from the circumstances in which it was received. Denning, J., in his judgment in the present case (4) referred to *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.* (5) and founded on the doctrine of "unjust enrichment", but that is no part of English law. The Crown also relied on *Attorney-General* v. *Goddard* (6), but this case goes far beyond that authority.

[VISCOUNT JOWITT, L.C. Mr. Attorney, their Lordships would like you to formulate the way in which you put your case.]

Sir Hartley Shawcross, A.-G., J. P. Ashworth and *Henry Fisher* for the Crown. The Crown does not ask the House to enlarge any principle of law and does not submit that it is in a different position from any other master. The uniform of a servant of the Crown is, however, different from the livery of a chauffeur; it clothes him with a different authority and is a very special asset. A soldier is under a duty to wear it in a way that is consistent with good order and discipline. The broad principle is that arising from the servant's relationship with his master; his duty is to serve the interests of his master and use the status conferred on him for the purposes of his master. In this case there was no difference in the basic reasoning of Denning, J., and the Court of Appeal. The appellant had realized a secret profit or bribe in the course of his employment by the Crown. The legal position is almost exactly the same as if the appellant had sold or hired his uniform to Manole. Whether the matter is rested on the conception of aequum et bonum or on an implied promise from the servant to the master, the result is the same.

In this connexion four classes of case are to be distinguished: (a) where the real relationship is that of trustee and cestui que trust: see *Regal (Hastings) Ld.* v. *Gulliver* (7); (b) where the relationship is that of debtor and creditor: see *Lister & Co.* v. *Stubbs* (8); (c) where the servant has used the property or time of his master to make a profit for himself: see *Shalcross* v. *Oldham* (9); (d) where the servant is engaging in activities in competition with his master's interests: see *Thompson* v. *Havelock* (10). The present case falls within (c) and (d). If a servant uses his master's property in a way conflicting with his master's interests he must account for it. The cases of money had and received rest on a fictitious basis and it is not necessary to show real consideration: see *United Australia Ld.* v. *Barclays Bank Ld.* (11) and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.* (12). If it can be shown in any case that the predominant cause of the profit made by the servant is that he is the servant of the master, the master is entitled to recover the money.

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(3) (1888) 39 Ch. D. 339.
(4) [1948] 2 K. B. 268, 275.
(5) [1943] A. C. 31, 61–4.
(6) (1929) 98 L. J. (K. B.) 743.
(7) [1942] 1 All E. R. 378.

Their Lordships took time for consideration.

Mar. 1. LORD PORTER. My Lords, the Lord Chancellor, who is unable to be present today, asks me to say that he concurs in the opinion that I am about to deliver.

[His Lordship stated the facts and continued:] The appellant's case also alleges that at all material times it was obligatory for all service personnel in Cairo to wear uniform, except when engaged in sport or other specially excepted activity. I can find no evidence to this effect but regard the allegation as immaterial to the decision which your Lordships are asked to reach.

In these circumstances Denning, J., held that the Crown was entitled to the money in question. It was, in his view, immaterial to consider whether the method of seizure was justified or not. Even if it was not, the Crown had a valid counterclaim and, avoiding a circuity of action, could thus defeat the appellant's claim. "The claim here is", he says (13), "for restitution of moneys which, in justice, ought to be paid over." It was suggested in argument that the learned judge founded his decision solely upon the doctrine of unjust enrichment and that that doctrine was not recognized by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland

(8) (1890) 45 Ch. D. 1.
(9) 2 J. & H. 609.
(10) (1808) 1 Camp. 527.
(11) [1941] A. C. 1, 29.
(12) [1943] A. C. 31, 62.
(13) [1948] 2 K. B. 268, 275.

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and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated.

But, indeed, this doctrine is not of the essence of Denning, J.'s judgment. His reasoning is to be found in the passage which succeeds that quoted. He says: "In my judgment, it is a principle of law that if a servant, in violation of his duty of honesty "and good faith, takes advantage of his service to make a profit "for himself, in this sense, that the assets of which he has "control, or the facilities which he enjoys, or the position which "he occupies, are the real cause of his obtaining the money, as "distinct from being the mere opportunity for getting it, that is "to say, if they play the predominant part in his obtaining the "money, then he is accountable for it to the master. It matters "not that the master has not lost any profit, nor suffered any "damage. Nor does it matter that the master could not have "done the act himself. It is a case where the servant has "unjustly enriched himself by virtue of his service without his "master's sanction. It is money which the servant ought not "to be allowed to keep, and the law says it shall be taken from "him and given to his master, because he got it solely by reason "of the position which he occupied as a servant of his master". And again (14): "The uniform of the Crown, and the position of "the man as a servant of the Crown were the sole reasons why "he was able to get this money, and that is sufficient to make "him liable to hand it over to the Crown". The learned judge, however, also says: "This man Reading was not acting in the "course of his employment: and there was no fiduciary relationship in respect of these long journeys nor, indeed, in respect of "his uniform". If this means, as I think it does, that the appellant was neither a trustee nor in possession of some profit-earning chattel, and that it was contrary to his duty to escort unwarranted traffic or possibly any traffic through the streets of Cairo, it is true, but, in my view, irrelevant. He nevertheless was using his position as a sergeant in His Majesty's Army and the uniform to which his rank entitled him to obtain the money which he received. In my opinion any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act. "You have

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(14) Ibid. 276.

"earned", the master can say, "money by the use of your "position as my servant. It is not for you, who have gained this "advantage, to set up your own wrong as a defence to my "claim".

Asquith, L.J., in the Court of Appeal, points out (15) that there is a well-established class of cases in which a master can recover whether or not he has suffered any detriment in fact, e.g., those in which a servant or agent has realized a secret profit, commission or bribe in the course of his employment, and that the sum recoverable is the amount of such profit. It is perhaps sufficient to refer in this connexion to *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (16), and to quote the words of Bowen, L.J.: "It is true, as Kekewich, J., says, that the money which is "sought to be recovered must be money had and received by the "agent for the principal's use; but the use which arises in such "a case, and the reception to the use of the principal which "arises in such a case, does not depend on any privity between "the principal and the opposite party with whom the agent is "employed to conduct business—it is not that the money ought "to have gone into the principal's hands in the first instance; "the use arises from the relation between the principal and the "agent himself. It is because it is contrary to equity that the "agent or the servant should retain money so received without "the knowledge of his master. Then the law implies a use, that "is to say, there is an implied contract, if you put it as a legal "proposition—there is an equitable right, if you treat it as a "matter of equity—as between the principal and agent that the "agent should pay it over, which renders the agent liable to be "sued for money had and received, and there is an equitable "right in the master to receive it, and to take it out of the hands "of the agent, which gives the principal a right to relief in "equity".

But it is said that this right to recover is subject to two qualifications: (1.) the sum obtained must have been obtained in the course of the servant's employment, and (2.) there must exist in the matter in question a fiduciary relationship between employer and employee.

It is often convenient to speak of money obtained as received in the course of the servant's employment, but strictly speaking I do not think that expression accurately describes the position where a servant receives money by reason of his employment but in dereliction of his duty. In *Attorney-General* v. *Goddard* (17) the bribes given to Sergeant Goddard were received by reason of his employment but not in the course of it, except in the sense that his employment afforded the opportunity by which the gain was made. Just as in the often-quoted instance of a servant letting out his own services and the use of his master's horses for private gain, he is not acting in the course of his employment, he is taking advantage of the position which his employment gives him and for reward so gained he is answerable to his master none the less, as *Attorney-General* v. *Goddard* (17) shows, though the obtaining of the money is a criminal act. It is true that the right of the master to demand payment of the money is often imputed to a promise implied from his relationship to the servant. I doubt whether it is necessary to raise such an implication in order to show that the money has been received to the master's use, but even if it were it may well be contended that there is no illegality in a servant promising to hand over to his master any sums he gains by use of his position. Nor would the master be affirming any criminal act committed by the servant in earning the sum claimed; he would only be saying that as between himself and the servant the servant could not set up his own wrong as a defence. Any third party's claim to the money would not be affected. In this aspect the making of the promise need not and should not in my view be referred to a point of time after the receipt of the bribe: it may well be ascribed to the time when the contract of employment was entered into.

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(15) [1949] 2 K. B. 232, 236.

(16) 39 Ch. D. 339, 367–8.

As to the assertion that there must be a fiduciary relationship, the existence of such a connexion is, in my opinion, not an additional necessity in order to substantiate the claim; but another ground for succeeding where a claim for money had and received would fail. In any case, I agree with Asquith, L.J. (18), in thinking that the words "fiduciary relationship" in this setting are used in a wide and loose sense and include, inter alia, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.

My Lords, the fact that the Crown in this case, or that any master, has lost no profits or suffered no damage is, of course, immaterial and the principle so well known that it is unnecessary to cite the cases illustrating and supporting it. It is the receipt and possession of the money that matters, not the loss or prejudice to the master.

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(17) 98 L. J. (K. B.) 743.

(18) [1949] 2 K. B. 232, 236.

In general I find myself in complete agreement with the views of the Court of Appeal as delivered by Asquith, L.J. I differ only as to the time to which the making of the implied contract is to be imputed. I should indeed have thought it unnecessary to add any observations of my own, had it not been for the interesting and closely argued contentions of Mr. Salmon for the appellant. As it is, I would nevertheless dismiss the appeal.

LORD NORMAND. My Lords, I agree with the Court of Appeal with the single reservation that I have not found it necessary to consider whether the Crown would have been entitled to succeed in an action at law for money had and received. On that question I would have desired to hear further argument had it been necessary to decide it.

Though the relation of a member of His Majesty's forces to the Crown is not accurately described as that of a servant under a contract of service or as that of an agent under a contract of agency, the Court of Appeal has held that he owes to the Crown a duty as fully fiduciary as the duty of a servant to his master or of an agent to his principal, and in consequence that all profits and advantages gained by the use or abuse of his military status are to be for the benefit of the Crown. I respectfully think that these are unassailable propositions, and further that the appellant cannot be allowed to propone as a defence to the Crown's claim his own criminal conduct either in accepting a bribe in breach of military discipline or in participating in an offence against the municipal law of Egypt.

LORD OAKSEY. My Lords, I agree with the judgment of the Court of Appeal except on one point. I do not think there is any difficulty in imputing to a servant an implied promise that he will account to his master for any moneys he may receive in the course of his master's business or by the use of his master's property or by the use of his position as his master's servant. There is nothing illegal in such a promise; on the contrary, in substance it is the basis for the equitable principle that an agent is accountable for profits made in the course of his agency without the knowledge and consent of his principal, and no less accountable if the profits arise out of corrupt transactions; an agent is bound to know the law and therefore when he enters into a contract of agency he impliedly undertakes to be accountable for any such profits.

It was further argued on behalf of the appellant that the Crown would not be entitled to property stolen in what is called a "smash and grab" raid in which a servant of the Crown had shared some of the stolen property, and this is no doubt true, but the reason is that the Crown could not assert a right to receive stolen property knowing it to have been stolen.

It was also argued that because a master is not liable for damages caused by a servant's use of the master's property when not engaged on the master's business it follows that the master cannot claim the profits. This argument appears to me to confuse the obligations of a servant or agent to his master with the principal's or master's obligations to third parties. It may be that there are cases in which a servant may use his master's property in the servant's hours of leisure and earn profits for which he is not accountable to the master. It would depend upon the facts and on the degree of user of the master's property, and the rule de minimis might apply in many cases.

But the appellant, who was a soldier on active service in time of war, was not an ordinary servant and his use of his uniform and his real rank and position was, as Denning, J., and the Court of Appeal pointed out, the real cause of his obtaining the money in question. The question—When is a soldier on active service and in uniform not on duty?—is one which will depend upon the facts of the case. Whether he is in uniform or not he is always bound to act so as not to prejudice order and good discipline, and in my opinion he is never entitled to appear in public in uniform in order to earn money without the knowledge and consent of the Crown.

LORD RADCLIFFE. My Lords, I agree that this appeal should be dismissed, for I see no answer to what has been said in the judgment of the Court of Appeal.

Appeal dismissed.

Solicitors: *Lewis & Lewis and Gisborne & Co.; Treasury Solicitor.*

E. H. BATTAT . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

J. C.*

1951
May 9;
June 12.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL IN THE SUPREME COURT OF THE COLONY OF SINGAPORE.

Singapore—Criminal Law—Finance Regulations—Validity—Military Administration Proclamation, 1945—*Singapore Colony Order in Council,* 1946 (*S. R. & O.* 1946, *No.* 464), *s.* 2, *sub-s.* 1; *s.* 40, *sub-s.* 1; *s.* 42, *sub-s.* 1; *s.* 49—*Indemnity and Validating Ordinance* (*No.* 1 *of* 1946), *s.* 5.

Assuming, without deciding, that the Military Administration Proclamation made at Kandy on August 15, 1945, by the Supreme Allied Commander, South East Asia, was invalid in origin, it is validated and continued in force by s. 5 of the Indemnity and Validating Ordinance, 1946 (enacted by the Governor on April 1, 1946, under s. 40 of the Singapore Colony Order in Council, 1946), which provides that "all laws, proclamations . . . made or issued during "the war period by or with the assent of any British or Allied "military authority shall be deemed to have been validly made from "the date of promulgation . . . ". The whole purpose of that Ordinance is to give validity to that which might otherwise have been illegal and to afford protection to those whose acts might otherwise have made them liable to process of law. Section 5 is to be regarded as a new law made by the Governor by virtue of the powers conferred on him by s. 40 of the Order in Council, or as an amendment of s. 42 of the Order in Council under the powers conferred by s. 49 of the Order.

Accordingly, the Singapore Finance Regulations, 1946 (for offences against which the appellant was convicted), which ultimately derive from the Military Administration Proclamation, are valid law of the Colony of Singapore.

Order of the Court of Criminal Appeal of Singapore affirmed, but on a different ground.

APPEAL (No. 10 of 1951), by special leave, from an order of the Court of Criminal Appeal in the Supreme Court of the Colony of Singapore (December 12, 1949), which had dismissed an appeal by the appellant against his conviction by the High Court of Singapore (October 20, 1949) for offences against the Singapore Finance Regulations. The order granting special leave to appeal limited the appeal to the question whether the law under which the High Court of Singapore purported to convict the appellant was at the time a law of the Colony of Singapore.

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* *Present*: LORD MORTON OF HENRYTON, LORD REID and LORD TUCKER.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee:—The Finance Regulations were made on January 4, 1946, by the Controller, Finance and Accounts, and approved on the same day by the Chief Civil Affairs Officer. They were expressed to have been made in exercise of powers conferred by s. 3 of the Finance Regulation Proclamation. That proclamation was made on December 31, 1945, by the Deputy Chief Civil Affairs Officer, Singapore, and was expressed to have been made under the Military Administration (Delegation of Powers) Proclamation which was dated October 1, 1945, and expressed to have been made by the General Officer Commanding Military Forces, Malaya, in exercise of powers conferred on him by the Military Administration Proclamation made at Kandy on August 15, 1945, by Lord Louis Mountbatten, Supreme Allied Commander, South-East Asia.

The regulations and intermediate proclamations all therefore ultimately derived from what had been referred to in the proceedings as the "Kandy Proclamation", which was expressed to have been made by reason of military necessity and for the prevention and suppression of disorder and maintenance of public safety. The validity of that proclamation was impugned at the trial on the ground that the Supreme Allied Commander had no power to legislate for British territory and that in any event the conditions prevailing did not justify the exercise of any such powers. That contention was rejected by the trial judge but was upheld by the Court of Criminal Appeal who, however, dismissed the appeal on other grounds. Before their Lordships' Board that question was not debated, as counsel on both sides were content in the first instance to deal with the issues on which the Court of Criminal Appeal found in favour of the Crown, leaving over the question of the validity of the Kandy Proclamation for subsequent consideration if their Lordships should be of opinion that the proclamation had not been validated and continued by subsequent legislation as the trial judge and Court of Criminal Appeal had held.

It was necessary to refer to the subsequent legislation which had been relied on as giving efficacy to the Kandy Proclamation and the subsequent proclamations and regulations made thereunder. The Straits Settlements (Repeal) Act, 1946, which received the Royal Assent on March 26, 1946, and became law on that date, enacted that on such day as His Majesty might by

Order in Council appoint the Straits Settlements Act, 1866, should be repealed, and made provision for bringing into being by Order in Council the new Colony of Singapore, and by s. 1, sub-s. 2, thereof further provided that such Order in Council might contain such provisions: " (*a*) determining the laws which, on and after " the appointed day, are (subject to amendment or repeal by any " competent legislature or authority) to remain valid as laws of " any of the said territories, notwithstanding the change in the " government thereof effected by the Order; (*b*) adapting or modi- " fying any such laws as aforesaid, and any other laws in force at " the passing of this Act relating or referring to any of the said " territories . . . as appear to His Majesty in Council necessary " or expedient in view of any such change as aforesaid ".

Section 2 was as follows: " The British Settlements Acts, " 1887 and 1945 (which authorize His Majesty to make laws and " establish institutions for British Settlements as defined in those " Acts) shall apply in relation to each of the territories into which " the said settlements and dependencies are divided by Order " under this Act as if it were a British settlement as so defined ".

On March 27, 1946, the Singapore Colony Order in Council, 1946 (S. R. & O., 1946, No. 464), was made. It recited the provisions of the Straits Settlements (Repeal) Act, 1946, and that by Order in Council made thereunder the appointed day was April 1, 1946, and proceeded: " Now, therefore, His Majesty, by " virtue and in exercise of the powers in that behalf by the Act " of 1946 and by the British Settlements Acts, 1887 and 1945, " or otherwise in His Majesty vested, is pleased, by and with the " advice of His Privy Council, to order, and it is hereby ordered, " as follows:— ".

The Order proceeded to provide for the appointment of a Governor and Commander-in-Chief, the establishment of a Legislative Council, the constitution of a Supreme Court and Subordinate Courts and to make provision for a transitional period pending the coming into operation of certain parts of the Order. The following sections of the Order required to be set out:—

Section 42, sub-s. 1: " Subject to the provisions of this Order, " the existing laws shall, except in so far as the same shall, in " their application to the Colony or any part thereof be repealed, " amended or otherwise affected by or under any Act of Parlia- " ment, Order of His Majesty in Council or any law made under " the provisions of this Order, continue to have effect in the " Colony or in that part thereof to which such law applied prior " to the appointed day, but shall be construed subject to such "modifications as may be necessary to bring them into conformity "with the provisions of this Order".

Section 2, sub-s. 1: "'the existing laws' means the common "law, the doctrines of equity and all Acts of Parliament, Orders "in Council, Ordinances of the Legislature of the Colony of the "Straits Settlements, Proclamations issued by the Governor of "the Straits Settlements, or by or under the authority of, the "Supreme Allied Commander, South-East Asia (other than the "Proclamations establishing the British Military Administration "and delegating powers thereunder), and all Rules, Regulations "and By-laws made thereunder and all other enactments or "instruments having the force of law in the territory comprising "the Colony or in any part thereof immediately prior to the "appointed day, whether the same were administered by the "British Military Administration or not".

Section 45: "Courts constituted for the Colony shall have "within their respective powers, jurisdiction with respect to all "offences (including offences against Proclamations issued by, or "under the authority of, the Supreme Allied Commander, South-"East Asia) . . .".

Section 40, sub-s. 1: "Until such time as section 13 and "Parts IV and V of this Order shall come into operation, it shall "be lawful for the Governor to make laws for the peace, order "and good government of the Colony".

Section 49: "The provisions of sections 42 to 48 inclusive of "this Order may be amended by laws made under Part V or "under section 40".

Pursuant to s. 40 above the Governor on April 1, 1946, enacted the Indemnity and Validating Ordinance, 1946. Section 5 thereof read: "All laws, proclamations, orders, rules, regulations and "legislative acts whatsoever made or issued during the war period "by or with the assent of any British or Allied military authority "shall be deemed to have been validly made from the date of "promulgation in the area concerned notwithstanding that any "such law, proclamation, order, rule, regulation or legislative act "may have repealed or amended or been inconsistent with any "law previously in force".

The trial judge (Brown, J.) was of the opinion that the British Military Administration constituted the de facto Government of Singapore at the time the regulations were made, and that it was not competent for the courts of Singapore to question the validity as laws of legislation which it had enacted. He further held that in any event the Finance Regulations, if not already valid, were validated by s. 5 of the Indemnity and Validating Ordinance, 1946.

The Court of Criminal Appeal (Murray Aynsley, C.J., Evans and Gordon Smith, JJ.) were of opinion that the Kandy Proclamation and the regulations made thereunder were invalid in origin, but they held that they had been validated and continued by the Order in Council of 1946.

1951. May 7, 8 and 9. *John Foster, K.C.*, and *Littman* for the appellant. The Order in Council in so far as it made or gave power to make new laws was ultra vires the Straits Settlements (Repeal) Act, 1946, in that it was made on March 27, 1946, before s. 2 of that Act came into force on April 1, 1946. Next, the moment hostilities ceased the Supreme Allied Commander had no legislative power in British territory, and the Kandy Proclamation never had any validity. That is the view which found favour with the Court of Criminal Appeal. The Order in Council did not validate the proclamation and the regulations made thereunder; it did not purport to do so, did not in fact do so, and did not do so on construction. If on its construction it did do so, then it was ultra vires. If that point is correct, the argument then shifts to the question whether, assuming that the proclamation was invalid, it was enacted as new law under subsequent legislation passed under s. 40 of the Order in Council. The respondent relies for this purpose on s. 5 of the Indemnity and Validating Ordinance, 1946, but all that that does is to decide that something was validly done in Lord Mountbatten's time, and unless some other enactment can be found which continues those proclamations and regulations into the new era of the Singapore Colony that section does not avail. That view is reinforced by the wording of the section.

On its proper construction, and on the basis that the proclamations and regulations were invalid, the Order in Council has not made them into valid law. There are a number of authorities on the construction point; there has been a conflict of two principles; the cases where it is said that the court should do its utmost to find a construction which does not make nonsense, but fits in with the intention of the framers of the legislation; on the other side is the principle that an Act of Parliament, much less delegated legislation, does not alter the law by merely betraying an erroneous opinion of it. Here, the conviction being under penal legislation, it would need a clear alteration of the law to make the whole body of proclamations into valid law.

[Reference was made to *Dore* v. *Gray* (1); *Ex parte Lloyd* (2); *Pitman* v. *Maddox* (3); *Prices of Wine* case (4); *Allen* v. *Flicker* (5); *Rolls* v. *Vestry of St. George the Martyr, Southwark* (6); *Earl of Shrewsbury* v. *Scott* (7); *Ormond Investment Co. Ld.* v. *Betts* (8); *Russell* v. *Ledsam* (9); *Norton* v. *Spooner* (10); *Mollwo, March & Co.* v. *Court of Wards* (11) and *Sprigg* v. *Sigcan* (12).] Those cases show that an erroneous assumption of the law by the legislature does not change the law without very clear words; the intention of the legislature is not sufficient if as a matter of construction the legislation has not achieved its intention. The principle that a new law should not be made for a new territory without express words is an important one. It is also important that delegated legislation should be clear and express. As regards intention, it is obvious that the Governor never intended by s. 5 of the Indemnity and Validating Ordinance to make a new law. It is too big a change for implication, because it means making new law out of something which was not law before. It is sought to imply here that delegated legislation, passed pursuant to s. 40 of the Order in Council, has created new criminal law, and that, it is submitted, is taking the doctrine of implication a very long way.

With regard to the words " having the force of law " in s. 2, sub-s. 1, of the Order in Council, the argument has so far proceeded on the assumption that the proclamation and regulations have not got the force of law. The Court of Criminal Appeal below held in the appellant's favour that the proclamations never had the force of law. Nothing has the force of law which is not law; the proclamations are not laws and have not the force of law just because they have the force of the army behind them. If it be right that this expression has to be applied to each of the categories in s. 2, sub-s. 1, of the Order in Council, then admittedly there may be difficulties in applying it to some and not to others. It is contended, however, that those words " having the force of law " apply only to the immediately preceding words " all other enactments or instru- " ments ". If it had been desired to continue the Kandy Proclamation the Order in Council should have said " and shall " continue to be in force and have the force of law in the

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(1) (1788) 2 Term R. 358, 365.
(2) (1851) 2 Sim. (N.S.) 248, 250.
(3) (1695) 2 Salk. 689.
(4) (1525) Hobart 215.
(5) (1839) 10 Ad. & E. 640.
(6) (1880) 14 Ch. D. 785, 799.
(7) (1859) 6 C. B. (N.S.) 1, 180.
(8) [1928] A. C. 143, 164.
(9) (1845) 14 M. & W. 574, 588.
(10) (1854) 9 Moo. P. C. 103, 125.
(11) (1872) L. R. 4 P. C. 419, 437.
(12) [1897] A. C. 238, 247.

" Colony ". The Court of Criminal Appeal were wrong in coming to the conclusion that the effect of the Singapore Order in Council was to make the proclamation into law even though it had not previously had the force of law. The Finance Regulations are not now, and never have been, part of the law of Singapore, and the appellant has been wrongly convicted.

Sachs, *K.C.*, and *Gahan* for the Crown. First, the proclamation of the Supreme Allied Commander and the regulations made under it, including the Finance Regulations, had the force of law up to and including March 31, 1946; as they were such laws on that date they were continued in force by the Order in Council through the combined effect of ss. 2 and 42. Secondly, assuming that the first point is wrong, and that the proclamation and regulations were not laws, then His Majesty had on March 27, 1946, power by Order in Council to make new laws with effect from the appointed day, April 1, 1946; and in fact ss. 2 and 42 of the Order in Council did make the proclamation and regulations into the law of the Colony as from April 1, 1946—that was the enacted intention of the Order. That conclusion can be arrived at by taking the Order in Council as a whole in the light of the circumstances at the time, and then this Board can proceed either to construe the words " having the force of " law " as referring to the de facto position of the proclamation, or alternatively, in so far as those words " having the force of " law " express, or are founded on, an erroneous conception of the legal position, ignore so much of the words as the Board feel necessary; it is suggested that the words " of law " may be those which might be disregarded quoad the proclamations. It is submitted, however, that despite any error that has been made by the legislating power as to the state of the law, nevertheless these proclamations were made law. Thirdly, assuming that the respondent is wrong on both his first and second points, it is contended that the effect of the subsequent Ordinances combined is to make the proclamations have the force of law, and reliance is placed on two Ordinances, both separately and combined, namely, the Transfer of Powers and Interpretation Ordinance, No. 2 of 1946, ss. 3 and 9, and the Indemnity and Validating Ordinance, No. 1 of 1946.

To take the second point first, the cases which it is proposed to cite fall into three groups. The first is where the legislature assumes that the law was x and it turned out that it was doubtful whether it was x or clear that it was not x. In that case the intention to enact is effective. The next group is where inept

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words are used—and inept words, it is assumed for the purposes of this argument, are " having the force of law ", though that is not conceded—and the courts ignore them in so far as they create an absurd situation. Finally, there is the case where the courts have alternative constructions, one which leads to a smooth working of the general scheme of the Act, and the other to uncertainty, and then on principle it is for the court to choose that which makes for smooth working.

The authorities in the first group are: *Norton* v. *Spooner* (13); *Ewart* v. *Graham* (14); *Reg.* v. *Mayor of Oldham* (15); those in the second group are: *Salmon* v. *Duncombe* (16); *Curtis* v. *Stovin* (17); *Rex* v. *Vasey* (18); the only authority in the last group is *Shannon Realties Ld.* v. *Ville de St. Michel* (19). On the construction of an obscure statute see *Seaford Court Estates Ld.* v. *Asher* (20). The whole burden of the cases is that what has to be ascertained is, what the legislature intended to effect. If the court is convinced of the legislative power, then it should, unless there is something in the Act which precludes it from so doing, follow the intention. So far as the proclamations are concerned, there is a patent intention that they should have effect in the Colony, and the words " having the force of law " should either be ignored or so construed as to give effect to that intention. Further, the effect of s. 45 of the Order in Council is to give to the courts of the new Colony jurisdiction to try offences and to deal with causes of action which arose under the proclamations before April 1. Considering ss. 45 and 46 independently of ss. 2 and 42 no conclusion can be reached other than that those two sections intended to say that these proclamations were laws, or, at any rate, that they had the force of law. The passage in *Salmon* v. *Duncombe* (21) should be applied where it said: " it is, however, a very serious matter to hold that when " the main object of a statute is clear, it shall be reduced to a " nullity by the draftsman's unskilfulness or ignorance of law ".

With regard to the ultra vires point, the effect of s. 2 of the Straits Settlements (Repeal) Act, 1946, is to vest forthwith in His Majesty in Council power " to make laws and establish " institutions " for the Colony. There is nothing either express or implied in that section to prevent it being acted on forthwith, and it should be so construed as to enable His Majesty in Council to declare in advance what are to be the new laws.

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(13) 9 Moo. P. C. 103, 128.
(14) (1859) 7 H. L. C. 331, 340, 346.
(15) (1868) L. R. 3 Q. B. 474, 477.
(16) (1886) 11 App. Cas. 627, 633.
(17) (1889) 22 Q. B. D. 513, 519.
(18) [1905] 2 K. B. 748, 751.
(19) [1924] A. C. 185, 192–3
(20) [1949] 2 K. B. 481, 498–9.
(21) 11 App. Cas. 627, 634.

To turn to the effect of the subsequent Ordinances, the effect of s. 5 of the Indemnity and Validating Ordinance, 1946, is that all the laws and proclamations mentioned in it are made valid up to, at any rate, March 31, 1946. If that be so, that is sufficient, for the result is that they are then caught up by s. 42 of the Order in Council as " existing laws ". The enacting intention becomes clear; the primary object at each stage was to lay down two things, (a) what was to be the law, and (b) how the courts were to deal with what was the law, and the same result was achieved whether the Order in Council or the subsequent Ordinance were considered.

[On the direction of the Board argument on the respondent's first point—as to the original validity of the Kandy Proclamation —was reserved.]

Foster, K.C., in reply. To hold this Order in Council is intra vires must necessarily involve the proposition that on March 27, His Majesty in Council had the power given to him under the Act of 1887 to legislate for territories which were not yet in being. The Order in Council is ultra vires. If it is, that disposes of the points on the Order in Council and on the subsequent Ordinances. The gist of the cases cited for the respondent is that in order to carry out the intention of the legislature violence may be done to the language of the enactment. Those cases do not apply to the position here. Even assuming that the laws and proclamations had been deemed to be validly made under s. 5 of the Indemnity and Validating Ordinance, and to continue to be validly made, they are not continued over after the appointed day. The Ordinance has not amended the Order in Council in that way.

May 9. LORD MORTON OF HENRYTON announced that their Lordships would humbly advise His Majesty that the appeal should be dismissed. There would be no order as to costs.

June 12. The reasons of their Lordships for dismissing the appeal were delivered by LORD TUCKER, who stated the facts and statutory provisions set out above, and continued:—As their Lordships are of opinion, for the reasons hereafter appearing, that, assuming the Kandy Proclamation to have been invalid in origin, it has been validated and continued in force by subsequent legislation, it becomes unnecessary to consider whether the Kandy

Proclamation standing by itself had originally the force of law. Their Lordships have heard no argument on this question, which clearly raises issues of great importance, and they desire to emphasize that counsel for the Crown did not accept the decision of the Court of Criminal Appeal on this issue and was prepared, if necessary, to support the conviction on the ground of the original validity of this proclamation. No inference adverse to this contention is therefore to be drawn from the fact that this judgment hereafter proceeds on an assumption of the invalidity of the Kandy Proclamation.

It was contended on behalf of the appellant that, assuming on its proper construction s. 42 of the Order in Council of March 27, 1946, had the effect of making the Kandy Proclamation law for the first time as from April 1, it was ultra vires the Straits Settlements (Repeal) Act, 1946, in that it was made five days before the appointed day under the Act and that no valid order under s. 2, which alone conferred the power to make new law, as distinct from continuing or modifying or adapting existing law, could be made until the new Colony came into existence on April 1.

Their Lordships are of opinion that there is no substance in this contention. The Act of 1946 came into force on March 26, 1946, and on that day s. 2 conferred the power to make new law for the new Colony. Their Lordships can see no reason why the Act should be interpreted as preventing His Majesty in Council making an Order as soon as the Act came in force to take effect as from the date when the new Colony would come into existence.

The next submission by the appellant was that the Order in Council in fact created no new law but merely continued in force existing law, and accordingly could not give validity to that which, on the present hypothesis, never had the force of law. This depends on the true construction of ss. 2 and 42 of the Order in the light of its other provisions. Section 42 enacts that " the " existing laws shall . . . continue to have effect ". Section 2 defines " the existing laws " as meaning those things which are there enumerated, concluding with the words " having the force " of law in the territory . . . immediately prior to the appointed " day ".

It was argued on behalf of the Crown that the words " having " the force of law " should be interpreted with reference to some of the enumerated things as meaning no more than de facto in force, though it was conceded that as regards others the words must be given their natural meaning. This was the view that found favour with the Court of Criminal Appeal. The difficulty with regard to this construction is the words " continue to have " effect " in s. 42. This is curious language to use in relation to that which previously had no effect if it was intended now for the first time to give it legal efficacy.

It was submitted alternatively that the words " having the " force of law " apply only to the immediately preceding words, namely, " all other enactments or instruments ". This would require some such word as " current ", " operating " or " applying " to be inserted before the words " in the territory ". There would be no difficulty in reading in some such word if this was necessary to give effect to the clear intention of the draftsman to be deduced from the Order as a whole, but as the scheme of the Order is consistent with the view that the draftsman was intending only to continue in force that which previously had the force of law de jure in the belief that the Kandy Proclamation and the Regulations made thereunder had such force, it is difficult to see the necessity for inserting words save for the purpose of giving to the section the interpretation contended for by the Crown but not borne by the language used in its natural meaning. Giving the words their natural meaning, this appears to be an instance of the principle that an Act of Parliament, and a fortiori delegated legislation, does not alter the law by betraying an erroneous opinion of it. Their Lordships are of the opinion that it would be an unjustifiable strain on the language used in ss. 2 and 42 to give them the interpretation for which the Crown contends.

It becomes necessary, therefore, to consider whether the subsequent legislation enacted pursuant to the powers conferred by the Order in Council has effected that which the Order in Council failed to achieve. In this connexion the Crown relies on s. 5 of the Indemnity and Validating Ordinance, 1946, the terms of which have been set out above. On this point the Court of Criminal Appeal expressed no opinion, but Brown, J., the trial judge, held that if, contrary to his view, the Kandy Proclamation was originally invalid, it was validated by this Ordinance.

It was argued by counsel for the appellant that the object of this clause was merely to afford protection to individuals who had acted under proclamations which might be held to be invalid and which were accordingly to be deemed to have been validly made. These words were, he said, not synonymous with " shall be " deemed to have had and shall continue to have the force of "law". He further contended that in any event the validity given was limited to those proclamations which would have been invalid only by reason of their having repealed or amended or been inconsistent with a law previously in force.

Their Lordships are of opinion that the words "shall be "deemed to have been validly made *from* the date of promulga-"tion" clearly indicate an intention to give legal efficacy to such proclamations from the date of their promulgation onwards and beyond April 1, 1946. The draftsman here is clearly envisaging the possibility of existing proclamations de facto in force being invalid in law and is intending to give them the force of law. The fact that he enumerates certain specified defects which might otherwise have rendered such instruments invalid does not, their Lordships think, limit the generality of the earlier words, which are sufficient to validate all the enumerated instruments provided they have in fact been made or issued in the period in question by or with the assent of the appropriate British or Allied military authority.

The whole purpose of this Ordinance, unlike the Order in Council, is to give validity to that which might otherwise have been illegal and to afford protection to those whose acts might otherwise have made them liable to process of law. Such being its purpose it requires, if need be, to be given a liberal interpretation so as to achieve that which its language shows to have been its object. Thus construed, s. 5 is to be regarded as a new law made by the Governor by virtue of the powers conferred on him by s. 40 of the Order in Council or as an amendment of s. 42 pursuant to the powers conferred by s. 49 of the said Order.

For these reasons their Lordships are of opinion that the law under which the High Court of Singapore purported to convict the appellant was at the time a law of the Colony of Singapore, and have accordingly humbly advised His Majesty that this appeal should be dismissed.

Solicitors: *Speechly, Mumford & Craig; Burchells.*

[HOUSE OF LORDS.]

H. L. (E.)*

1950
Nov. 28,
29, 30.
1951
Mar. 1.

HALES . . . . APPELLANT;

AND

BOLTON LEATHERS LD. . . . . RESPONDENT.

Workmen's Compensation—National insurance—Transitional provisions—Industrial disease—Workman's claim for both injury benefit and compensation—Validity—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 1, 9, 43, *Sch. III—National Insurance* (*Industrial Injuries*) *Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *ss.* 1, 55, 89, *sub-s.* 1, *proviso* (*a*).

By s. 89, sub-s. 1, of the National Insurance (Industrial Injuries) Act, 1946: "Workmen's compensation shall not be payable in respect of any employment on or after the appointed day, "and accordingly the enactments set out in Sch. IX to this Act "are hereby repealed as from that day to the extent mentioned "in . . . that Schedule:—Provided that (*a*) the said enactments "shall continue to apply to cases to which they would have applied "if this Act had not been passed, being cases where a right to "compensation arises or has arisen in respect of employment "before the appointed day, except where, in the case of a disease "or injury prescribed for the purposes of Part IV of this Act, "the right does not arise before the appointed day, and the "workman, before it does arise, has been insured under this Act "against that disease or injury . . .". By that Schedule the Workmen's Compensation Acts were repealed.

Before July 5, 1948, the "appointed day" for the coming into operation of the National Insurance (Industrial Injuries) Act, 1946, a workman was certified under s. 43 of the Workmen's Compensation Act, 1925, to be suffering from dermatitis produced by dust or liquids and to be disabled from earning full wages. The disease being due to the nature of his employment, his employers paid him compensation under that Act. Before the appointed day his incapacity ceased and he returned to his former work with those employers. After the appointed day he suffered a recrudescence of the dermatitis of which he had not been completely cured. He applied for and received benefit for the incapacity under the Act of 1946, but subsequently, contending that his previous application was misconceived, claimed compensation under the Act of 1925.

Held (*per* Lord Simonds, Lord Normand and Lord MacDermott, Lord Oaksey dissenting) that the workman was not entitled to compensation under the Act of 1925, since the conditions for the operation of the exception to proviso (*a*) of s. 89, sub-s. 1, of the National Insurance (Industrial Injuries) Act, 1946, were both fulfilled.

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

Per Lord Simonds, Lord Normand, Lord Morton of Henryton and Lord MacDermott, Lord Oaksey dissenting:—In the terms of the exception to proviso (*a*), the right to compensation did not arise before the appointed day; the workman had ceased to suffer disablement from the disease before the appointed day, and a right to compensation does not arise until a present right to receive a money payment is established.

Per Lord Simonds, Lord Normand and Lord MacDermott, Lord Oaksey dissenting:—In the terms of the exception to proviso (*a*), before any right to compensation arose, the workman, on the true construction of s. 55, sub-s. 1, of the Act of 1946, had been insured under that Act against the disease which "developed on or after "the appointed day" on its recrudescence after it had been inactive.

Per Lord Morton of Henryton: Since on this question there was no finding by the arbitrator, the case should be remitted to him.

Decision of the Court of Appeal [1950] 1 K. B. 493 affirmed.

APPEAL from the Court of Appeal (Bucknill, Somervell and Denning, L.JJ.).

On November 27, 1947, the workman (the appellant), while in the employment, as a leather worker, of the employers (the respondents), who were tanners, was certified to be suffering from dermatitis produced by dust or liquids, a disease coming within s. 43 of the Workmen's Compensation Act, 1925, and to be thereby disabled from earning full wages at the work at which he had been employed. November 26, 1947, was certified as the date of the commencement of the disablement. The employers paid him compensation on presentation of the certificate. He was off work totally disabled until December 12, 1947, when he returned to his old work. The "appointed day" for the coming into force of the National Insurance (Industrial Injuries) Act, 1946, was July 5, 1948, on which day the workman was not suffering from any incapacity and was still employed by the employers at his old work. He remained at that work until August 14, 1948, when he was again disabled by a recurrence or recrudescence of his original disease of which he had never been completely cured. Since that date he had been wholly or partially incapacitated, being totally incapacitated from August 14, 1948, to December 8, 1948, and again from December 30, 1948, to March 10, 1949, and partially incapacitated thereafter.

In respect of the total and partial incapacity he sought and was paid industrial injury benefit, in accordance with the provisions of the Act of 1946, for the maximum period of 156 days and thereafter disablement benefit. The application was not

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made under professional advice. On April 7, 1949, the workman applied for arbitration under the Workmen's Compensation Act, 1925, thereafter contending that his previous application was misconceived. By an award made by His Honour Judge Walmsley sitting as arbitrator he was on June 15, 1949, awarded various sums under the Workmen's Compensation Acts.

The arbitrator found as a fact that there had been " a recur-" rence or recrudescence of his original dermatitis ". He said that the issue was " whether the right to compensation, that is " to say to the compensation which is now being claimed, arose " before or after the appointed day ", and he held that it arose before it. He also said: " It is common ground that if the right " to compensation arose after the appointed day the [workman] " had become insured under the National Insurance Act before " it arose ". The Court of Appeal likewise assumed that it was agreed that he was insured under this Act. However, before the Appellate Committee of the House of Lords, junior counsel on either side, who had appeared before the arbitrator, stated that they had agreed that " this workman was on a disease-" producing occupation " and that counsel for the workman did not contend that he was not insured under the Act of 1946.

The Court of Appeal reversed the decision of the arbitrator and the workman appealed to the House of Lords.

Paull, K.C., *Charles Elliott* and *R. M. H. Everett* for the appellant workman. The questions are: (a) did the right to compensation arise in respect of employment before the appointed day? (b) Did it arise before the appointed day? (c) Does the workman in these proceedings claim under that right? The answer to each being in the affirmative, he is entitled to compensation. His claim is in respect of the whole period. He was never entitled to benefit under the Act of 1946 and there is no question of his being entitled to benefit under both Acts.

On the true construction of s. 89, sub-s. 1, of the Act of 1946 the right to compensation arose on November 27, 1947 (i.e., before the appointed day). Its words do not mean that the workman is estopped from enforcing his accrued right, and the Workmen's Compensation Acts continue to apply to his case. The right to compensation arises as soon as the injury occurs: see *Thornton* v. *Walker* (1). Once the right has arisen it remains at all times until the man has fully recovered: see *Richards* v.

(1) 1934 S. C. 279; 27 B. W. C. C. Suppt. 1.

Goskar (2) and *King* v. *Port of London Authority* (3). Once an order has been made in the terms set out in the latter case (4) the workman has a right to compensation. This was not a case of personal injury "caused on or after the appointed day", within s. 1, sub-s. 1, of the Act of 1946. The right to compensation in respect of the recurrence arose and was "in respect "of employment before the appointed day", within s. 89, sub-s. 1 (*a*). When the workman was incapacitated on August 14, 1948, he was entitled to weekly payments under an agreement: see reg. 8 (5) of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948. His right arose by reason of the certificate of November 27, 1947, which the employers had recognized by not appealing. They had therefore agreed that compensation was payable for so long as the disease lasted, together with the disability arising from it, looked at as a whole. Thus he was never insured under the new Act. The right to compensation having accrued before the Act was passed, there is nothing in the Act to take away the right.

As to recrudescence, it is to be noted that development is treated as distinct from recrudescence in s. 55, sub-s. 4, of the Act of 1946. When a recrudescence appears the workman simply claims further payments under his right to compensation which has arisen on the granting of the certificate. He must rely on his rights under the first certificate unless he gets a second certificate. If he gets a second certificate which only deals with the disablement, and not with the date of disablement, his right is still under the first certificate: see *Richard Evans & Co. Ld.* v. *Scahill* (5). If the certificate contains a new date of disablement the workman may claim under his new right. *Eaton* v. *George Wimpey & Co. Ld.* (6), relied on by the employers, is a case in which the facts are very far from those of the present case. All it really decides on its different facts is that if the workman gets a second certificate which gives a new date he may found his right on the new certificate. Here there is only one certificate. Once a man has obtained a certificate of disablement, and has been disabled, his right under that certificate goes on existing even though he goes back to full work. It goes on until it is found as a fact that he is fully recovered: see also *MacNamara* v. *India Tyre and Rubber Co. Ld.* (7), *Walden*

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(2) [1937] A. C. 304.
(3) [1920] A. C. 1.
(4) Ibid. 12–13.
(5) (1927) 137 L. T. 161.
(6) [1938] 1 K. B. 353.
(7) 1937 S. C. 186; 30 B. W. C. C. Suppt. 47.

v. *Mono-Concrete Co. Ld.* (8), and *Birch* v. *Pease & Partners Ld.* (9). A right to compensation is not the same thing as a right to payment of compensation. If on his first disability the workman had gone to the court and obtained a declaration of liability he would then have been entitled to compensation under the award so soon as he broke down again. Even though the right to compensation ceased on December 12, 1947, and had not recurred on the appointed day, the fact that it did exist in 1947 was enough to keep the right alive in the workman's favour as regarded the disease.

Even if the right to compensation be held to have arisen after the appointed day, the workman was not insured under the Act of 1946. This is the effect of reg. 8 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948, which excludes this workman from benefit. The Minister has the right to explain the meaning of development by regulations and their words must be read into the Act.

Beney, K.C., and *Robert Lambert* for the respondent employers. The broad background of s. 89, sub-s. 1, of the Act of 1946, is that Parliament was faced with the existing Workmen's Compensation Act under which there were a large number of outstanding claims both in regard to ordinary accidents and in regard to industrial diseases, and its intention in the case of both was that the workmen's rights were to remain undisturbed, but under proviso (*a*) there was a special provision in the case of diseases. If the right arises since the appointed day and the workman has been insured under the Act of 1946 before it arises he is entitled to benefit under it and the Workmen's Compensation Acts do not apply. Under s. 55 of the Act if after the appointed day the workman is in an employment which may give rise to the disease he is insured under the Act.

As to the nature of the employment the same considerations would apply as in *Blatchford* v. *Staddon and Founds* (10). The crucial words in s. 89, sub-s. 1 (*a*), are " right to compensation ". There is no ground for distinguishing between the right to compensation and the right to payment of compensation. The words in question do not occur in the Workmen's Compensation Acts. The normal meaning of compensation is a money payment, and under those Acts there was no right to compensation in the absence of incapacity or disablement: see *Ocean Coal Co. Ld.* v. *Davies* (11). It is a misconception that an award always gives

(8) [1943] K. B. 683.
(9) [1941] 1 K. B. 615.
(10) [1927] A. C. 461.
(11) [1927] A. C. 271, 292.

a right in futuro: see *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ld.* (12) and *Amalgamated Anthracite Collieries Ld.* v. *Wilds* (13). A right to compensation means a right to a present payment based on a present incapacity. It is concerned only with a claim being made and dealt with. Suppose an accident occurred on January 1, 1948, and was followed by incapacity which ceased so that on the appointed day there was none, but that later further incapacity recurred. On the workman's argument the mere repeal of the Workmen's Compensation Acts by s. 89 would not affect the man's right to receive compensation for that incapacity. His right, being an accrued right, would be saved by the Interpretation Act, 1889, s. 38. There would be no point in the proviso to s. 89 of the 1946 Act. The existence of the proviso supports the employers' argument that there must be an existing incapacity before there is a right to compensation and no right to compensation in respect of the post-appointed day incapacity existed on the appointed day. The exception to s. 89, sub-s. 1 (*a*), is confined to the case of diseases. The reason for it was that in the case of diseases one may get recurring attacks of the same disease (or recrudescences) and it is often hard to say whether in a particular case there is a recrudescence of an old attack or a fresh attack after recovery.

The broad intention appears to be that if a man is insured under the Act of 1946, then, if he becomes a casualty after the appointed day the Act will take care of him, but if he is not thereafter in employment to which the disease may be due he should be able to go back to his old employer and make him pay. The fact that a man has suffered from dermatitis in the past does not necessarily mean that he will have a recurrence of it and so a declaration of liability is not automatically given in such cases. Even if given it does not itself give any right to compensation. It has no magic in matters of this kind. *Harris* v. *Rotol Ld.* (14) and *Holloway* v. *Mobberley & Perry Ld.* (15) are good illustrations of how the proviso can be worked out and accord with the employers' contentions.

Eaton v. *George Wimpey & Co. Ld.* (16) does not help or hinder either side. When the workman in the present case was attacked by the disease in August, 1948, he was insured against it by reason of s. 55 of the Act of 1946. The right to compensation which is relevant to the consideration of s. 89, sub-s. 1, is

(12) [1937] 2 K. B. 426.
(13) [1948] A. C. 440, 447.
(14) [1950] 2 K. B. 575.
(15) [1951] 1 K. B. 316.
(16) [1938] 1 K. B. 353.

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the right caused by that attack. If these points are well founded the exception in proviso (*a*) applies, because the right to compensation did not arise before the appointed day and before it arose he had been insured against the disease. This case has proceeded throughout on the footing that the workman was insured under the Act of 1946 before the right to compensation arose. The contention that he was not insured raises matters of fact which he should not be allowed to raise at this stage. It is not open to the workman to take the point now as to the alleged agreement within reg. 8 (5). There is no trace of the contention in his printed case.

Paull, K.C., in reply. The scheme of the Act of 1946 is that if a man has an old injury or disease his old employer is liable. If he has a new injury or a new disease he comes under the new Act. The workman obtained a certificate and took it to his employers, who paid him compensation thereunder. This constituted an agreement under which he was entitled to weekly payments whenever a breakdown occurred: see *Birch* v. *Pease & Partners Ld.* (17). The compensation is payable in respect of the employment of 1947 before the appointed day and so the case cannot be within the Act of 1946. This conclusion falls in line with the scheme of the Act. *Ocean Coal Co. Ld.* v. *Davies* (18) and *Amalgamated Anthracite Collieries Ld.* v. *Wilds* (19), leave the workman's argument quite unaffected. As soon as there is injury by accident the right to compensation arises and it is a cardinal principle of the Workmen's Compensation Acts that other provisions must not cut down the right given by s. 1 of the Act of 1925.

Their Lordships took time for consideration.

1951. March 1. LORD SIMONDS. My Lords, on November 27, 1947, the appellant while in the employment of the respondents was certified to be suffering from dermatitis produced by dust or liquids, a disease coming within s. 43 of the Workmen's Compensation Act, 1925, and to be thereby disabled from earning full wages at the work at which he had been employed. November 26, 1947, was certified as the date of the commencement of the disablement. He was off work totally disabled until December 12, 1947, when he returned to his old work with the respondents. He remained at that work until August 14, 1948, when he was again disabled by a recurrence or recrudescence of his original disease from which he had never been completely cured. Since that date he has been wholly or partially incapacitated and in respect of his incapacity was, by an award made by His Honour Judge Walmsley sitting as arbitrator on June 15, 1949, awarded various sums under the Workmen's Compensation Acts. The question is whether, having regard to the provisions of the National Insurance (Industrial Injuries) Act, 1946, the award was rightly made. This question the Court of Appeal has answered in the negative; I agree with its conclusion and with the lucid exposition of the Act given by Somervell, L.J.

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(17) [1941] 1 K. B. 615.
(18) [1927] A. C. 271.
(19) [1948] A. C. 440.

The Act of 1946, of which the long title is " An Act to sub-" stitute for the Workmen's Compensation Acts, 1925 to 1945, " a system of insurance against personal injury caused by accident " arising out of and in the course of a person's employment and " against prescribed diseases and injuries due to the nature of a " person's employment, and for purposes connected therewith ", provides by s. 1, sub-s. 1, that: " Subject to the provisions of " the Act, all persons employed in insurable employment shall be " insured in manner provided by this Act against personal injury " caused on or after the appointed day by accident arising out of " and in the course of such employment ". The " appointed " day " was July 5, 1948, on which day the appellant was not suffering from any incapacity; he was employed by the respondents at his old work. Prima facie, but subject to the provisions of this section, he became at once an insured person within this section.

I can pass over the many sections in which provision is made as to contributions and benefits and kindred matters and come to Part IV which is headed " Extension of Insurance to Diseases, " etc.". Section 55, sub-s. 1, provides that: " Subject to the " provisions of this Part of this Act, a person who is under " this Act insured against personal injury caused by accident " arising out of and in the course of his employment shall be " insured also against any prescribed disease and against any " prescribed personal injury not so caused, being a disease or " injury due to the nature of that employment and developed on " or after the appointed day ". The single word in this section upon which any doubt can arise is " developed ". Sub-s. 4 of the same section enacts that provision may be made by regulations for determining the time at which a person is to be treated for the purposes of the Act as having developed any disease or injury as therein mentioned and the circumstances in which any

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such disease or injury is, where the person in question has previously suffered therefrom, to be treated as having recrudesced or as having been contracted or received afresh. The implication of this sub-section is that a disease may be said to " develop " whether it recrudesces or is contracted afresh. I much doubt whether I am entitled to look to the regulations for guidance on the meaning of the word in sub-s. 1, but I will say something on this point later. So far the Act has contained no such provision for the substitution of the new system for the old as the title has indicated. It is by s. 89 that this is effected. That section, which is the crucial section for this appeal, provides that workmen's compensation shall not be payable in respect of any employment on or after the appointed day, and accordingly that the enactments therein referred to (which are all the Acts relevant to our present purpose) shall be repealed from that day. But there is a proviso to the sub-section of which the relevant part is as follows: " Provided that (*a*) the said enactments shall continue " to apply to cases to which they would have applied if this Act " had not been passed, being cases where a right to compensation " arises or has arisen in respect of employment before the " appointed day, except where, in the case of a disease or injury " prescribed for the purposes of Part IV of this Act, the right does " not arise before the appointed day and the workman, before it " does arise, has been insured under this Act against that disease " or injury ".

My Lords, the apparently simple words of this proviso conceal their difficulty. It is clear that apart from the proviso the appellant could get no benefit under the Workmen's Compensation Acts. Is he then within the proviso? And, if he is prima facie within it, is he nevertheless taken out of it by the words of exception? The difficulty of determining this question is due, I think, to the artificial character of the notional accident with which the exception deals. The case of ordinary accident is clear and straightforward. I take the illustration given by Bucknill, L.J. (20), which Somervell, L.J., cited (21). A groom is kicked by his employer's horse before the appointed day. He suffers no disablement at the time, but after the appointed day he develops an injury and becomes incapacitated. His right to compensation under the Workmen's Compensation Acts arises after the appointed day but it arises in respect of employment before that day. It is therefore preserved by the proviso. It was urged that a right to compensation arises when the accident occurs which causes the subsequent disablement.

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(20) [1950] 1 K. B. 493. 496.

(21) Ibid. 504.

This is not, in my judgment, a tenable view. A right to compensation, i.e., to receive a weekly sum during incapacity, does not arise until it has been established as a legal right by agreement or award. But the difficulty, as I have said, arises in regard to the notional accidents with which the section deals by way of exception out of the proviso. They do not in any case as a practical matter fall easily within it. The legislature might, I suppose, have dealt with them in one of several ways. It might have excluded from all the benefits of the Act of 1946 for all time any person who after the appointed day suffered from a recrudescence of a prescribed disease in respect of which he had before that day had a right to compensation under the earlier Acts, leaving him to such remedy as he might have under those Acts: or it might have wiped the sheet clean, and, if the workman suffered a recrudescence of a disease in respect of which he had had before the appointed day, but had not at that day, a right to compensation, have provided benefit for him under the new system whatever his present circumstances. Or it might adopt a compromise which would, so far as foreseen, avoid a gap between the two systems, leaving the workman in the case of a recrudescence of an old disease to his old remedies if he was not insured under the new Act, but substituting the new benefit for the old if he was so insured. This is what I think the words of exception to the proviso are intended to accomplish, though it may be that they do not wholly bridge the gap. For, as I read them, they provide that, if a workman is otherwise within the proviso, he is taken out of it if he satisfies two conditions: (a) that his right to compensation in respect of a disease does not arise before the appointed day, and (b) that, when it arises, he is insured under the Act of 1946 against that disease.

As to the first of these conditions, I interpret the word "arise" in the same sense as before and say that the right does not arise until upon a recrudescence of the disease after the appointed day the present right to receive a weekly payment is established: in other words, the right does not arise before the appointed day merely because the workman suffered from the disease before the appointed day if he had ceased to suffer from it at the appointed day. And in regard to the second condition I think that on the true interpretation of s. 1, sub-s. 1, and s. 55, sub-s. 1 (which determine whether a workman is "insured under "this Act") the appellant was so insured. It is clear that his disease was due to the nature of his employment: the only doubt is whether it was "developed" on or after the appointed day. I should regard this word as apt to cover equally an original outbreak of disease and a recrudescence of it after it had been inactive. The manifestation of the disease and the consequent incapacity of the workman are the grounds of claim and, when these occur, I think that the disease can properly be said to "develop" within the meaning of s. 55, sub-s. 1. But I would add two observations on this part of the case. First, if I may look at the regulations made under s. 55, sub-s. 4, to assist in the interpretation of the word, I agree with my noble and learned friend, Lord Normand, in thinking that they assist or, at least, are consistent with this interpretation. Secondly, I think that there was much force in Mr. Beney's argument for the respondent that this case throughout proceeded on the footing that the appellant became insured under the Act of 1946 before his right to compensation arose. But taking the view that I do of the meaning and effect of the Act, I do not think it right to decide against the appellant on this narrow point.

LORD NORMAND. My Lords, in this appeal a difficult problem is presented on the construction of the National Insurance (Industrial Injuries) Act, 1946, which came into force on the appointed day, July 5, 1948, and which I shall hereinafter call the Act of 1946. The question relates to those diseases formerly known as industrial diseases and provided for by s. 43 of the Workmen's Compensation Act, 1925, and now dealt with as "prescribed "diseases" under the Act of 1946. The matter for decision is, what are the circumstances which entitled a workman incapacitated by one of those diseases, in this case dermatitis, still to claim compensation under the Workmen's Compensation Act, 1925, notwithstanding the repeal of that Act by s. 89, sub-s. 1, and Sch. IX of the Act of 1946.

The material facts are clearly set out by the learned arbitrator in his judgment, and in brief the appellant, having suffered from dermatitis and having received compensation in respect of a resulting incapacity to earn wages in a period which ended before the appointed day, claims compensation in respect of incapacity to earn caused by a return after the appointed day of the dermatitis, of which he had never been wholly cured.

The Act of 1946 necessarily had to deal with the difficulties of transition from the compensation scheme of the Workmen's Compensation Act to the benefit scheme of the Act of 1946. It was apparent, for example, that there would be cases where an accident took place before the appointed day without causing an incapacity till after the appointed day or causing an incapacity terminating before the appointed day but renewed after it, and cases where an industrial disease contracted before the appointed day might cause an incapacity, whether for the first time or by recrudescence, after the appointed day. Those difficult cases, as well as others more simple where a disability caused either by accident or disease began before the appointed day and continued uninterrupted till after the appointed day, were dealt with by s. 89.

The enacting part of the section declares that " workmen's " compensation shall not be payable in respect of any employment " on or after the appointed day " and proceeds to the repeal of the Workmen's Compensation Act, 1925, as from that date. As I read that part of the section the words " on or after the appointed " day " qualify " any employment ". But I think it would make no difference in this case if they were read as qualifying " payable ". Then the first proviso deals with the transitional difficulties. It begins by continuing in force the Workmen's Compensation Act and applying it to cases to which it would have applied if the Act of 1946 had not been passed, " being cases " where a right to compensation arises or has arisen in respect of " employment before the appointed day ". There, at any rate, " before the appointed day " qualifies " employment ". Then follows an exception, applying to, inter alia, any prescribed disease. The exception depends on the fulfilment of two conditions, first that " the right to compensation " does not arise before the appointed day; and second that the workman, before it does arise, has been insured under the Act against that disease. If both these conditions are fulfilled the workman is within the Act of 1946 and entitled to benefit thereunder. If either of them is unfulfilled he is still within the Workmen's Compensation Act, 1925. There is a clear intention that the workman suffering from incapacity caused by a prescribed disease shall be entitled either to benefit under the provisions of the Act of 1946 or to compensation under the provisions of the Workmen's Compensation Act but not to both.

Whether the first condition has been fulfilled in this case depends on the meaning of " the right to compensation " in the sub-section. This expression is not found in the Workmen's Compensation Acts, but " compensation " is a term of art in these Acts and means " weekly payments during incapacity ".

Prima facie, therefore, " a right to compensation " is a right to a weekly payment during incapacity. In the first part of the proviso " arises " looks forward from the appointed day and means " arises after the appointed day "; " has arisen " looks backward and means " has arisen before the appointed day ". If " a right to compensation " has its prima facie meaning there is no difficulty where there has been injury by accident arising out of and in the course of an employment before the appointed day. If the incapacity " arises " for the first time after the appointed day, the workman is entitled to compensation and not to benefit. If the incapacity " has arisen " before the appointed day and continues at the appointed day the workman is entitled to compensation. If an incapacity " has arisen " before the appointed day, and there has been a recovery, but the incapacity again " arises " after the appointed day, the workman is entitled to compensation.

Under the second part of the proviso the first condition has, in the present case, been fulfilled, for the right to compensation, meaning the right to a weekly payment as compensation for incapacity, does not arise before the appointed day. The words " does not arise before the appointed day " appear to be no more than the equivalent of " arises on or after the appointed day ". There was, on the appointed day, no right to a weekly payment and there was no incapacity, and it is only after the appointed day that the incapacity supervenes and the right arises.

To understand the second condition, that the workman has been insured against " that " disease before the right to compensation arises, it is necessary to go back to s. 1, sub-s. 1, and s. 55, sub-s. 1, of the Act of 1946. Section 1, sub-s. 1, enacts that: " Subject to the provisions of this Act, all persons employed " in insurable employment shall be insured . . . against personal " injury caused on or after the appointed day by accident arising " out of and in the course of such employment ". Section 55, sub-s. 1, enacts that: " Subject to the provisions of [Part IV] " of this Act a person who is . . . insured against personal injury " caused by accident arising out of and in the course of his " employment shall be insured also against any prescribed disease " . . . being a disease due to the nature of that employment and " developed on or after the appointed day ". There is no doubt that the disease in this case was due to the nature of the employment, and the only question is whether the disease developed on or after the appointed day. In my opinion the word " develop " is as apt a word as can be chosen to describe what happens when a disease of gradual onset becomes active and manifests itself as a disabling condition, or, having been active and become latent, again becomes active and manifests itself as a disabling condition. The change from latency to activity and from activity to latency may occur frequently with a disease like dermatitis and each time that the change from latency to activity takes place the disease is properly said to develop. If that is the construction of the word, then the condition from which the appellant suffered on August 14, 1948, was a development of a dermatitis which had been latent on the appointed day.

But under s. 55, sub-s. 4, regulations may provide for determining the time at which a person is to be treated for the purposes of the Act as having developed a prescribed disease, and the circumstances in which a prescribed disease is, when the person in question has previously suffered therefrom, to be treated as having recrudesced or as having been contracted afresh. It was suggested that in this sub-section the development of the disease was to be regarded as something distinct from and opposed to recrudescence and as akin to the original contracting of a disease. The wording of the sub-section does not ground such an inference, for it is consistent with a classification in which the development of a disease includes a recrudescence as well as a fresh contraction.

The National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948, were made under s. 55, sub-s. 4, and though in my opinion they cannot control the construction of the Act, it is yet of some importance to consider whether they fit into the construction which I think the Act properly bears. In these regulations the date of "development" is defined by reg. 6 which provides [(2.) (*a*)] that "where the claim . . . is " . . . for injury benefit, the date of development shall be the " first day on which the claimant was incapable of work as the " result of the disease on or after the appointed day". It should be explained that injury benefit is the benefit available under insurance for the first 156 days of the incapacity whether the incapacity is caused by accident or by disease. Regulation 8 (1.) deals inter alia with the case in which a claim is made "for " benefit in respect of a prescribed disease . . . suffered by a " person to whom compensation under the Workmen's Compen- " sation Acts had been awarded or paid in respect of the same " disease and, at the date of such claim for benefit . . . (*a*) that " person was in receipt of weekly payments in respect of such " compensation; or (*b*) any liability . . . for such compensation "had been redeemed by the payment of a lump sum, or had "been the subject of a composition agreement . . .". The regulation provides that in these circumstances "the disease in "respect of which the claim is made shall be treated for the "purposes of these regulations as a recrudescence of the disease ". . . and not as having developed on or after the appointed "day unless it is determined in the manner provided . . . that "the disease was in fact contracted afresh". So far this provision read with reg. 6 does not help the appellant, because he was not in receipt of weekly payments at the date of any possible claim to benefit in respect of the incapacity which began on August 14, 1948. But it is important to note that the underlying hypothesis of reg. 8 (1.) is that without it the "recrudescence" would have been treated as a "development"; and the regulation was made in order to prevent that. Accordingly a workman who has been awarded or paid compensation in respect of one of the prescribed diseases and at the date of the claim to benefit (a) is not in receipt of weekly payments in respect of such compensation and (b) has not received a lump sum paid in redemption of liability for such compensation or entered into a composition agreement is within the Act of 1946, because the disease is then treated as having "developed" on or after the appointed day.

I must refer lastly to reg. 8 (5.): "For the purpose of this "regulation, a person shall be deemed to be, or to have been, "in receipt of a weekly payment of compensation if (*a*) he was "in fact receiving such payment; or (*b*) he is or was entitled "thereto under an award or agreement made under the Work-"men's Compensation Acts". As a last resource it was submitted that the appellant was, when he became incapacitated on August 14, 1948, entitled to weekly payments under an agreement, and the agreement was said to have been formed when the respondents paid compensation to the appellant on presentation of the certificate of November 27, 1947. I shall assume, contrary to my opinion, that it is open to the appellant to take this point, though he has obtained no finding from the learned arbitrator that there was an agreement, though he would not have been entitled to go to arbitration if there had been an agreement, and though the point was not taken either before the learned arbitrator or before the Court of Appeal; yet the supposed agreement is irrelevant. Admittedly it could not put the appellant in a better position than he would have been in if instead of an agreement he had obtained an award in terms of the order pronounced by this House in *King* v. *Port of London Authority* (22). Such an order would have entitled him to make further application in adjourned arbitration proceedings to have it determined that incapacity for work had ensued, that the incapacity was caused by the disease, and that he was entitled to a certain weekly payment; but the order itself and without a further order would not have entitled him to any weekly payment.

In my opinion, therefore, the regulations referred to are consistent with the meaning which I think s. 89, sub-s. 1, naturally bears.

I hold that both the conditions for the application of the exception in proviso (*a*) of s. 89, sub-s. 1, have been satisfied, and that the appellant is within the Act of 1946 and is not entitled to compensation under the Workmen's Compensation Act, and I would dismiss the appeal.

LORD OAKSEY. My Lords, in my opinion this appeal ought to be allowed. There are really two questions involved, first whether the Workmen's Compensation Acts "continue to "apply" to the case of the appellant within the meaning of the proviso to s. 89, sub-s. 1, of the National Insurance (Industrial Injuries) Act, 1946, hereinafter called "the Act", and second whether the appellant's case is within the exception to that proviso because before his right to compensation had arisen he had been insured under the Act.

The first question depends upon the meaning of the words in the proviso, "cases where a right to compensation arises or has "arisen in respect of employment before the appointed day". The words appear to me to deal with two classes of cases: cases where a right to compensation arises on or after the appointed day in respect of employment before the appointed day and cases where a right to compensation has arisen before the appointed day in respect of employment before the appointed day. There can, it seems to me, be no other meaning to the words "arises "or has arisen", and in the present case it is clear that a right to compensation had arisen on November 26, 1947, before the appointed day when the appellant was certified to be suffering from dermatitis and was paid workmen's compensation. The exception has, in my opinion, no application since the right to compensation had arisen before the appointed day. The word

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(22) [1920] A. C. 1, 39.

"the" cannot, in my opinion, be read as referring to a different right to compensation from the right to compensation referred to in the words "a right to compensation arises or has arisen". The word "the" is natural and grammatically correct as meaning "the right above referred to". If this is the true view the second question does not arise. But I am of opinion that the appellant was not insured under the Act, because the disease was not "developed on or after the appointed day" within the meaning of s. 55, sub-s. 1, of the Act.

In the first place it appears to me that these words must be words of limitation or qualification and cannot, therefore, include diseases which developed before the appointed day. The category "any prescribed disease" is limited or qualified by the words "due to the nature of that employment and developed on or "after the appointed day". The word "developed", therefore, cannot be construed as meaning "manifesting itself" or "breaking out" or "causing incapacity", because in these senses a disease may have developed both before and on or after the appointed day.

But the Act does not leave the matter there. It provides, by sub-s. 3 of s. 55, for regulations which "may provide that a "person who developed the disease . . . at any time . . . "before the regulations came into force *but not before the* "*appointed day*, shall be treated . . . as if the regulations had "been in force when he developed the disease . . .". This sub-section, in my view, supports the construction I put on the word "developed", namely, that regulations under the section could only apply to diseases developed on or after the appointed day.

And again, sub-s. 4 of s. 55 appears to me to support this construction. The regulations are "for determining the time at "which a person is to be treated . . . as having developed any "disease . . . and the circumstances in which any such disease "is, where the person has previously suffered therefrom, to be "treated as having recrudesced or as having been contracted or "received afresh". In my opinion it is clear that "recrudescence" is treated by the Act as something different from "development". The provision for regulations dealing with circumstances in which, although the person has previously suffered from the disease, it is not to be treated as having recrudesced but as having been contracted or received afresh, shows, in my opinion, that "development" really means "being "contracted or received afresh" although the person may have "previously suffered from the disease".

I agree with your Lordships in thinking that the regulations themselves (National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948) cannot alter the meaning of the words of the statute, but they may, I think, be looked at as being an interpretation placed by the appropriate government department on the words of the statute. Regulations 6, 7 and 8 distinguish and contrast "recrudescence" and "development". Regulation 8 (5.) provides that if a person is or was entitled to compensation under an award or agreement under the Workmen's Compensation Acts he shall be deemed to be or to have been in receipt of a weekly payment of compensation and by para. (1.) his "disease . . . shall be treated . . . as a recrudescence . . . "and not as having developed on or after the appointed day ". . . unless it is determined . . . that the disease was in fact "contracted afresh". These are the very words of the regulations and, in my opinion, they demonstrate that in such a case as the present, where the person in question has been found as a fact to be suffering from a prescribed disease which has recrudesced, he would not have been treated under the regulations as being insured under the Act.

For these reasons and for the reasons stated by Judge Walmsley, with which I agree, I am of opinion that the appeal should be allowed.

LORD MORTON OF HENRYTON. My Lords, the relevant facts have already been stated, and I shall only restate them so far as is necessary in order to explain the view which I take of this appeal.

The "appointed day" referred to in the National Insurance (Industrial Injuries) Act, 1946 (hereinafter called "the Act of "1946"), was July 5, 1948. On August 14, 1948, the appellant was totally incapacitated from work by dermatitis and the arbitrator (His Honour Judge Walmsley) has found as a fact that this attack was a "recurrence or recrudescence" of an attack of dermatitis which had disabled the appellant from November 27, 1947, till December 12, 1947. The appellant had returned to his old work after the earlier attack and had received full compensation, in respect of the period of sixteen days just mentioned, from his employers, the respondents.

I need not set out the appellant's medical history since August 14, 1948. It is enough to state that he applied for, and has received, under the Act of 1946, injury benefit for the maximum period of 156 days and thereafter disablement benefit. He now contends that his application, which was not, I think, made under professional advice, was misconceived, that he has never been entitled to benefits under the Act of 1946, and that he is entitled to claim compensation from the respondents under the Workmen's Compensation Acts.

I turn first to s. 89, sub-s. 1, of the Act of 1946, which has already been read. It is, I think, clear that if there had been no proviso to s. 89, sub-s. 1, the appellant's present claim would have been untenable, but it is necessary to consider whether the appellant's case falls within the first part of proviso (*a*), and, if it does, whether it is taken out of the proviso by the exception.

In my opinion " a right to compensation " does not " arise " within the meaning of this proviso until the workman has a present right to receive a money payment. This seems to me to be the natural meaning of the words used. They are not technical words and the industry of counsel has not revealed any instance of their use in the Workmen's Compensation Acts. Counsel for the appellant invited us to hold that a workman had a right to compensation if an order had been made in his favour in the terms set out in *King* v. *Port of London Authority* (23), and that the appellant's " right to compensation ", in respect of the recurrence of the disease on August 14, 1948, " arose " on November 27, 1947. I am wholly unable to accept this very artificial construction of these ordinary English words, and I can find nothing in the context which should lead your Lordships to give these words any unusual meaning. On the contrary, I think that the meaning which I have described as their natural meaning is the one which fits most naturally into the scheme of the Act of 1946.

Turning again to the proviso, I am prepared to assume that counsel for the appellant is right in contending that the appellant's case is one in which " a right to compensation has arisen " *in respect of employment before the appointed day* ", because the attack of August 14, 1948, was a recurrence of a disease which arose out of employment before the appointed day.

Whether this contention is right or wrong, I am clearly of opinion that the appellant had no " right to compensation " during the period from December 12, 1947, to August 14, 1948, when he was in full work and that " the right " arose on

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(23) [1920] A. C. 1, 12–13.

August 14, 1948, when he was again incapacitated. Thus "the "right" did not arise before the appointed day, and the appellant falls within the exception to the proviso in s. 89, sub-s. 1, if it is correct to say of him that he was insured against this attack of dermatitis before it arose.

Now, my Lords, comes a difficulty. Mr. Paull for the appellant now invites your Lordships to hold that, even if the right to compensation arose after the appointed day, the appellant had not been, before the right arose, "insured under this Act against "that disease or injury", within the meaning of the exception in proviso (*a*) to s. 89, sub-s. 1. Unfortunately, your Lordships have not the advantage of a finding upon this point by the learned arbitrator. He stated the issue between the parties as being "whether the right to compensation, that is to say, to the com"pensation which is now being claimed, arose before or after the "appointed day" and later stated: "It is common ground that "if the right to compensation arose after the appointed day, the "applicant had become insured under the National Insurance Act "before it arose". Your Lordships heard a statement by the two junior counsel who appeared before the arbitrator, from which it appears that both counsel then agreed that "this workman was "on a disease-producing occupation", and that counsel for the present appellant did not contend that he was not insured under the Act of 1946 before August 14, 1948. In those circumstances it is not, perhaps, surprising that the learned arbitrator made the statement set out in my second quotation from his judgment. Somervell, L.J., in delivering the judgment of the Court of Appeal, said (24): "In the present case in our opinion the right "to compensation in respect of the incapacity as from August, "1948, arose after the appointed day. The Workmen's Com"pensation Acts do not, therefore, apply if the workman has "been insured under the Act of 1946 against that disease. It is "agreed that this condition is fulfilled".

Mr. Paull bases his contention that the appellant was not so insured upon reg. 8 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948, made under s. 55, sub-s. 4, of the Act of 1946. Mr. Beney for the respondents submits that this contention involves the decision of matters of fact, and that the appellant ought not to be allowed to raise it at this stage. He also submits that there is no trace of this contention in the appellant's case. For my part, my Lords, I do not think that this House should decide upon this question, which is said to be of great general importance, on the material now before it. If the appellant is to be allowed to raise this contention at this stage —and that is a matter for serious consideration—I think that the case should be remitted to the arbitrator to decide upon the matter, which he described as being " common ground ".

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(24) [1950] 1 K. B. 493, 504–5.

LORD MACDERMOTT. My Lords, on the arguments presented at the Bar this appeal raises two main questions.

The first of these is as to the true construction of proviso (*a*) to s. 89, sub-s. 1, of the National Insurance (Industrial Injuries) Act, 1946, under which the repealed Workmen's Compensation Acts are to continue to apply to certain cases. On this question I find myself in substantial agreement with the views expressed by the Court of Appeal and, for that reason, I shall state my conclusions as briefly as possible.

Proviso (*a*) relates to cases " where a right to compensation " arises or has arisen in respect of employment before the " appointed day ". It is, I think, plain that the last five words must be read together and that the employment referred to is employment before the appointed day, which was July 5, 1948. On the other hand it is, in my opinion, no less clear that the expression " arises or has arisen " looks to either side of the appointed day, " arises " being apt to connote what may arise thereafter and " has arisen " what has or may have arisen before that day, which, it will be remembered, is also the date of repeal. That being so, the phrase " a right to compensation " must include not only a right to compensation which has ripened before the appointed day, but also a right which, though its source lies in something that happened before the appointed day, does not arise as " a right to compensation " until after that day. This conforms with what I take to be the policy of the Act, namely, that the employers' liability should, in general, continue after repeal towards those whose accident occurred before, but whose compensatable incapacity did not occur (or re-occur if it had stopped) till after the appointed day, as well as towards those whose right to a weekly payment was complete by that day. The words " a right to compensation " must, therefore, mean more than the inchoate right which accrued to a workman once he had sustained, or was deemed to have sustained, personal injury by accident arising out of and in course of his employment. They contemplate that that inchoate right may have required some interval ending beyond the appointed day, in order to mature into a right to receive compensation. On these grounds, and also because it is reasonable to assume that the legislature intended the words to mean the same thing irrespective of whether the right arose before or after the appointed day, I am of opinion that they must be read as connoting a present right to receive compensation, as distinct from a right to compensation which is contingent upon some future event, e.g., the occurrence or re-occurrence of incapacity.

Before going further it will be convenient to see how this construction affects the appellant's case. At the appointed day he was at work and suffering no incapacity. But he had been in receipt of compensation previously on account of dermatitis and I think it is apparent from the decisions of this House in *King* v. *Port of London Authority* (25) and *Richards* v. *Goskar* (26), that immediately before that day he had a right *in respect of* compensation in the sense that if incapacity recurred he would be entitled to have his weekly payments continued without starting de novo and on a new certificate. But that was not " a right " to compensation " if the meaning I have given those words is correct. A right to compensation had not, therefore, arisen by the appointed day. But such a right did arise, within the meaning of the first part of proviso (*a*), thereafter, that is after August 14, 1948, when incapacity due to the original disease again supervened. I am, therefore, of opinion that, unless the exception to proviso (*a*) otherwise requires, the Workmen's Compensation Acts would continue to apply to the appellant's case.

The second question is whether the words of that exception touch the appellant. If they do, proviso (*a*) will not be in point and the said Acts will no longer determine his rights. The exception comes into operation if both of two conditions are satisfied—(1.) that the right to compensation did not arise before the appointed day, and (2.) that before that right arose the appellant had become insured under the Act of 1946 " against that " disease ". For the reasons already given, the first of these conditions must here be held satisfied.

The matter, therefore, turns on the second condition and amounts to this—had the appellant become so insured before August 14, 1948? It may, I think, be taken as the intention of the legislature that the injured workman should not, if possible, be left to fall between the two stools of workmen's compensation and industrial benefit, and I therefore read the words " against

(25) [1920] A. C. 1.

(26) [1937] A. C. 304.

"that disease" as referring not merely to insurance against a prescribed disease, but to insurance against that disease as it hits and incapacitates the workman at the relevant time. I should mention that this question of insurability was not raised in the courts below, both of which seem to have regarded it as agreed that the appellant was so insured. I am in some doubt whether, in the circumstances, it is now open to the appellant to make the case that he was not insured at the material time. But the point is one of law, and as it was debated at some length before your Lordships I think the most convenient course will be to deal with it.

On the facts the appellant must, in my view, be regarded as insured within the meaning of proviso (*a*) if the disease "developed on or after the appointed day" as those words are used in s. 55, sub-s. 1, of the Act of 1946. For light on that, one must look outside the Act to regulations made under certain of its provisions for the purpose, amongst others, of determining, in the words of sub-s. 4 of s. 55, "the time at which a person is "to be treated for the purposes of this Act as having developed "any disease . . .".

The relevant statutory instrument is the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. 1948, No. 1371). This is a formidable document, but reference need only be made to three of its regulations. Of these reg. 6 provides (in so far as is now material) that, for the purposes of the first claim for benefit under the Act in respect of a prescribed disease, the date of development shall be the first day on which the claimant was incapable of work as the result of the disease on or after the appointed day. Regulation 7 deals with recrudescence of a prescribed disease; but as I read this regulation it relates only to further attacks after a first claim under the Act and has no direct bearing on the present question.

So far there is nothing to exclude the appellant from benefit. He contends, however, that reg. 8 has that effect. This regulation is concerned with transitional cases where workmen's compensation has previously been awarded or paid in respect of the same disease. Paragraph (1.) thereof, when read in conjunction with the applicable words of para. (5.), provides, so far as material to the facts of this case, that the disease in respect of which a claim is made shall be treated as a recrudescence of the disease for which compensation was awarded or paid and *not as having developed on or after the appointed day* if—(i) workmen's compensation has been awarded or paid in respect of the same disease, and (ii) at the date of such claim the claimant was in fact receiving weekly payments in respect of such compensation, or was entitled to such payments under an award or agreement made under the Workmen's Compensation Acts. The principal object of reg. 8 is, I think, to prevent an overlapping of compensation and benefit payments, and the design of its material provisions is reasonably clear once this is recognized. If the conditions I have enumerated are not both satisfied the risk of double payment is gone, the claimant's date of development is as provided for by reg. 6 (i.e., on or after the appointed day), and, in consequence the claimant is an insured person excepted from proviso (*a*) and therefore entitled to benefit but not to compensation. But if, on the other hand, both the conditions are satisfied, then the claimant has a present right to receive compensation in respect of employment before the appointed day and, not being an insured person, stays within proviso (*a*) and is, accordingly, entitled to compensation but not to benefit.

It remains to consider whether these conditions were satisfied in the appellant's case when he claimed benefit under the Act of 1946 in or about August, 1948. Condition (i) clearly was. But, in my opinion, condition (ii) was not. He was not receiving weekly payments in fact, nor was he entitled to any such payments under any award or agreement. At the time of claiming benefit the appellant's rights to workmen's compensation would not, at most, have been greater than those conferred by the form of order in *King* v. *Port of London Authority* (27). But that only gave a right to apply, and fell far short of entitling the workman to a weekly payment. In my opinion, the terms of reg. 8 (5.) (which I have incorporated in stating condition (ii)) march with the expression "a right to compensation" as used in proviso (*a*) and refer not to an inchoate right but to a present right to receive compensation.

For these reasons I have reached the conclusion that reg. 8 does not apply, that the appellant was, in consequence, an insured workman for the purposes of the exception to proviso (*a*) and, accordingly, that the Workmen's Compensation Acts did not continue to apply to his case after their repeal. I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Corbin, Greener & Cook, for Morrish & Co., Leeds; Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester.*

(27) [1920] A. C. 1.

SMITH . . . . APPELLANT; H. L. (E.)*

AND

LONDON TRANSPORT EXECUTIVE . . RESPONDENTS.

1950
Nov. 22, 23, 27.
1951
Mar. 1.

Nationalization — Road transport — British Transport Commission — London Transport Executive—Scheme made by commission and approved by Minister—Functions delegated to executive—Activities transferred from London Passenger Transport Board—Ancillary activities—New omnibus service—Route approval by licensing authority—No road service licence—Powers of executive—London Passenger Transport Act, 1933 (23 *Geo.* 5, *c.* 14), *s.* 15—*Transport Act,* 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 2, *sub-s.* 1; *ss.* 12, 14, *sub-s.* 4; *s.* 65, *sub-s.* 1.

The British Transport Commission created by the Transport Act, 1947, sealed, in exercise of their powers under the Act, a scheme whereby they delegated to the London Transport Executive all their functions relating to (a) activities which they were empowered to carry on by virtue of the transfer to them of the undertaking of the London Passenger Transport Board, and (b) activities which they were empowered to carry on by virtue only of the powers conferred on them by s. 2, sub-s. 1, of the Act so far as those activities were carried on in connexion with the activities under (a) or were ancillary to them. The scheme was approved by the Ministry of Transport. The undertaking of the board was vested in the commission under the Act on January 1, 1948, and in the same month the executive obtained route approval under s. 65 of the Act for a specified service. The route lay wholly outside the "special area" in which the board had had an effective monopoly, but, save as to 400 yards, within the "London Passenger "Transport Area" wherein the board had been able to operate subject to obtaining a road service licence under s. 72 of the Road Traffic Act, 1930. The distance of 400 yards was along a road on which the board might run vehicles provided that they did not pick up or set down passengers.

Held, that the commission had the same statutory right as the board to operate the service within the London Passenger Transport Area, but that, though they had to obtain route approval, there was no need for them to obtain a road service licence under the Act of 1930.

Held, further, that the commission had effectively delegated their powers and rights to the executive in the terms of the scheme.

Per Lord Simonds, Lord Normand and Lord Morton of Henryton. The commission by virtue of s. 2, sub-s. 1, of the Act of 1947 were authorized to pick up and set down passengers on the 400-yard stretch of road outside the London Passenger Transport Area.

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* *Present*: LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

Per Lord Oaksey and Lord MacDermott. On the 400-yard stretch of road the commission and the executive were subject to the former restrictions as to picking up and setting down passengers.

Decision of the Court of Appeal [1949] Ch. 685 affirmed.

APPEAL from the Court of Appeal (Evershed, M.R., Somervell and Jenkins, L.JJ.).

Under the London Passenger Transport Act, 1933, the London Passenger Transport Board were set up and empowered to provide road services of stage carriages within a certain radius of London. Within an area marked with a black line on the signed deposited map, the London Traffic Area or "special area", the board had a virtual monopoly of passenger road services and were not obliged to apply for road service licences. Beyond this was an outer area enclosed within a continuous purple line, the London Passenger Transport Area, within which, though the board had no such monopoly, they were authorized to run passenger road services, picking up and setting down passengers, subject to obtaining a road service licence under the general law as enacted by ss. 72–76 of the Road Traffic Act, 1930. Outside the London Passenger Transport Area were certain roads, marked by broken blue or yellow lines on the map, along which the board might run services provided that they did not pick up or set down passengers on the roads marked yellow.

By s. 1 of the Transport Act, 1947, which came into force on January 1, 1948, the British Transport Commission were set up with power, inter alia, to carry goods or passengers by road within Great Britain. Among the undertakings vested in the commission was that of the London Passenger Transport Board. The Act also provided for the setting up of a number of public authorities known as executives, among which was the London Transport Executive, the duties of which were to exercise as agents of the commission such functions as were delegated to them under a scheme of delegation made by the commission and approved by the Minister.

In December, 1947, the commission made and the Minister of Transport approved a scheme of delegation containing the following provisions. By para. 2: "This scheme applies to the "following activities of the commission: (*a*) activities which "the commission are empowered to carry on by virtue of the "transfer to them under Part II of the Act of the undertaking "of the London Passenger Transport Board; (*b*) activities which "the commission are empowered to carry on by virtue only of

" the powers conferred upon them by s. 2, sub-s. 1, of the Act " so far as those activities are carried on in connexion with the " activities referred to in sub-paragraph (*a*) of this paragraph or " are ancillary to such activities; . . .". By para. 3: " Subject " to the provisions of this scheme, the commission hereby delegate to the executive the functions of the commission in " relation to their activities set out in sub-paras. (*a*) and (*b*) of " para. 2 of this scheme to the intent that, subject as aforesaid, " all the rights, powers and liabilities of the commission in connexion with those activities shall be exercisable and dis" chargeable by the executive . . .".

On March 4, 1947, the board had made an application for a road service licence to operate a passenger service on a route between Hitchin and Weston in the county of Hertford. It lay within the London Passenger Transport Area save that for a distance of about 400 yards it lay outside that area along a road marked yellow on the map. The appellant, Wilfrid Smith, had lodged his objection to the grant, and the matter had not been disposed of when the Act of 1947 came into force.

Since about 1932 the appellant had operated a service of stage carriages between Hitchin and Weston. This he did under the authority of a road service licence issued to him by the Traffic Commissioners for the Metropolitan Area under s. 72 of the Road Traffic Act, 1930.

On January 1, 1948, the application made by the board for a road service licence in respect of their proposed Hitchin–Weston service was withdrawn, and on January 28, 1948, the London Transport Executive, purporting to act as agents for the British Transport Commission, applied instead to the licensing authority for route approval. On February 5, 1948, this was granted, and the service was brought into operation on February 18, 1948.

The appellant brought an action against the executive, causing a writ to be issued on March 23, 1948. By his statement of claim he pleaded that the executive had wrongfully and unlawfully started to operate the service and that he had suffered damages and loss thereby. He claimed (a) an injunction to restrain them from " continuing to operate a road passenger " transport service of stage carriages along the route between " Hitchin and Weston and Weston and Hitchin ", (b) a declaration that they had no statutory power or authority to operate the service, and (c) damages.

The executive in their defence pleaded that they were constituted under s. 5 of the Transport Act, 1947, and that by a scheme of delegation made by the British Transport Commission and approved by the Ministry of Transport in December, 1947, the commission delegated to the executive their functions in relation to their activities set out in para. 2 (*a*) and (*b*) of the scheme, which activities included activities which the commission were empowered to carry on by virtue of the transfer to them of the undertaking of the London Passenger Transport Board. Amongst those activities was the operation of road passenger services. They further pleaded that by reason of the provisions of the Transport Act, 1947, they did not require a road service licence to operate the service in question.

The action was dismissed by Vaisey, J., and, the Court of Appeal having affirmed his order, the appellant appealed to the House of Lords.

Sir David Maxwell Fyfe, K.C., and *G. R. F. Morris* for the appellant, the plaintiff. The general scheme of the Transport Act, 1947, is not consistent with a power in the commission to operate a service wherever they like. One does not expect an Act the key-note of which is economy and the avoidance of wasteful competition to give the commission power to start indiscriminate road fights. The intention was not to allow them to co-ordinate services by driving other services off the road. If they wish to deal with other services they can exercise the powers of acquisition given to them by the Act. The appellant's main contentions are:—(a) The powers conferred on the commission by s. 2, sub-s. 1, of the Act to operate road passenger transport services are " subject to the provisions of this Act ", and the commission cannot operate the service in question in the absence of a specific provision in the Act empowering them to do so. Their powers are only exercisable subject to the provisions of the Act or in accordance with the provisions of the Act.

(b) Further, on a strict interpretation of the provisions for vesting the undertaking of the board in the commission, there has been no vesting of powers in respect of the operation of road services outside the special area: see s. 14.

(c) Finally, on the true construction of the scheme of delegation of functions, there was no effective delegation to the executive of the power to operate the service.

As to the exercise of the powers of the commission, these can only be carried into effect in a way authorized by the Act. As a creation of statute they can only do what the Act says they can do. They can only run a service if given statutory power to do so. It is true that the provisions are all enabling provisions but they bring one back to what is contained in the Act. Taking, for example, s. 2, sub-s. 1 (*a*), that cannot be a complete power in the commission to run railways wherever they like: it must be a power to run railways in accordance with the powers given under Part II of the Act. So, too, in the case of road transport, the power cannot be supposed to be completely unfettered. Under the Act the commission have only three ways of operating a road passenger transport service. These limit the exercise of the powers in s. 2, sub-s. 1, to the specific methods for which provision was made. It is limited to (a) powers acquired on the acquisition of undertakings by agreement under s. 7; (b) rights transferred on the vesting of undertakings under s. 12; (c) powers embodied in an order made by the Minister of Transport under s. 63 and Sch. VIII in respect of an area road transport scheme. The service in question does not fall within any of these categories. If s. 2, subs. 1 (*a*), had given complete and unrestricted powers to the commission, nothing else would have been necessary and it would have been needless to give special powers later. The view put forward by the executive would create great anomalies. Thus even if an order had been made in respect of an Area Road Transport Scheme, the executive could still run pirate buses in the area under their residuary powers.

At the date when the undertaking of the board was vested in the commission, the board had no power to operate the service in question, and could not have done so without a road service licence; and on the vesting the commission did not acquire greater powers than the undertaking possessed. The right of the board was not a right to run omnibuses in the London Passenger Transport Area outside the "special area", but a right to apply for a licence to do so. It cannot be assumed that because they applied for it they would get it, for the object of the application is that the matter should be decided. The fact that one may run an undertaking does not mean that one may also run a service which may only be run by obtaining a licence. A right to apply is not the same thing as a right to run. There is a distinction between a power or capacity to do a thing subject to licence and a right to do it.

As to s. 65 (which refers to route approval of the passenger road transport services of the commission), it is limited to passenger road transport services provided by the commission under an area road transport scheme or otherwise under the Act. Route approval is directed to little more than road conditions.

The words "or otherwise" do not take the matter any further: they relate to the power of the commission to operate services after the acquisition of an undertaking by agreement or by vesting. The wording of s. 65 is a convenient way of saying that the licensing provisions shall not apply. It should be construed as applying only to existing services.

If s. 2, sub-s. 1 (*a*), does give general powers to cover the service in question the vesting provisions cannot be construed as transferring any powers, since that would amount to duplication. But if the commission's powers are so enjoyed and do not come to them from the transfer of the board's undertaking, the commission's functions have not been effectively delegated, since para. 2 (*a*) and (*b*) of the scheme presuppose the commission's power to have been obtained by virtue of the transfer of the board's undertaking.

Paull, K.C., and *J. P. Ashworth* for the respondent executive, the defendants. By s. 2, sub-s. 8, of the Act of 1947, it is declared that the commission cannot disregard "any enactment "or rule of law"; but there is nothing at common law to prevent the commission from running omnibuses and carrying passengers anywhere in Great Britain. The words "subject to the provisions "of this Act" in s. 2, sub-s. 1, are words of limitation, and one must go to the Act to see whether it contains any limitation on the powers which the commission would otherwise possess. General powers are given subject to any limitation which may be found in the Act. The words "subject to the provisions of this "Act" in s. 2, sub-s. 1, are to be treated in the same way as the words "subject to Sch. I hereto . . ." in s. 19 of the Supreme Court of Judicature Act (1873) Amendment Act, 1875. There one does not look to the Schedule to see what the practice is: one takes the general words subject to the limitations. The commission and the executive can do anything which they are not forbidden to do by common law or statute. The commission have power to run omnibuses anywhere in Great Britain and to operate the service in question, and it is not necessary for them to obtain a road licence but route approval alone, which is only directed to road conditions. This is the effect of s. 65, sub-s. 1, of the Act of 1947. The words "or otherwise" in sub-s. 1 are important. The commission can operate either under the general authority of s. 2, sub-s. 1, or as successors to the board under ss. 12–14; and in either case without obtaining a road service licence. Under s. 2, sub-s. 1 (*a*), there is both the power to carry passengers anywhere in Great Britain and also the right to exercise that power, this general right being additional to the specific rights to carry out schemes authorized by ss. 63 and 64 and to carry on undertakings vested in or purchased by the commission in accordance with the express terms of ss. 12–14, 16, 39, 47, 55, 63 and 64. Despite these express but qualified rights, the commission may under the broad powers of s. 2 compete with any undertaking, subject to obtaining route approval.

All the powers which the board had immediately before the vesting day under the Act of 1947 were (quite apart from s. 2, sub-s. 3, and s. 14 of the Act) automatically transferred to the commission by the vesting in them of the board's undertaking under s. 12. In inaugurating this service the commission are exercising the rights of the board vested in them. By s. 15 of the London Passenger Transport Board Act, 1933, limitations were imposed on their powers, particularly as regards obtaining road service licences under ss. 72–76 of the Road Traffic Act, 1930; but now that it is repealed the powers of the board transferred to the commission and delegated to the executive are free from the restrictions imposed by it; for once s. 15 is repealed one comes back to the general powers under s. 3, sub-s. 3, of the Act of 1933, which is not repealed, and it is possible for the commission to operate without restriction, taking vehicles by the shortest routes, alike within the London Passenger Transport Area and on the roads outside it, as along the 400 yards of "yellow" road included in this service. The application of s. 3, sub-s. 3, to the commission, read in relation to the board's undertaking, is effective to transfer the running rights. It is by s. 128, sub-s. 2 (*b*), and Sch. XV, Pt. II, of the Act of 1947, that s. 3, sub-ss. 1, 2 and 4, and s. 15 of the Act of 1933, are repealed, the scheme of s. 128 being to repeal limiting sections. Disregarding s. 3, sub-s. 1, of the Act of 1933, there would be no reason in that Act why the routes should not be extended throughout England.

Apart from s. 2, sub-s. 3, of the Act of 1947, s. 14, concerning the general effect of the vesting of undertakings, confers on the board's successor the right to run along the whole of the route in question, including the 400 yards of "yellow" road, but without the restriction to which the board were subject as to the picking up and setting down of passengers. Under s. 14, sub-s. 2, the rights vesting are not limited to proprietary rights.

By the scheme of delegation the commission effectively delegated to the executive their powers to run this service, freed by

s. 65 of the Act of 1947 from previous restrictions. The whole of the activity in question is covered by para. 2 (*a*) of the scheme, save perhaps the picking up and setting down of passengers on the " yellow " road, and that is covered in any event by para. 2 (*b*).

Ashworth following. The main question is whether the commission themselves have power to run this service. Before the Act reached the statute book the legislature was faced with the problem of the powers to be conferred on the new body which was to take over the existing bodies. It might have given the new body powers of its own or else it might have confined it to the powers possessed by the existing bodies and no more. It took a middle course, conferring on the new body original powers of its own as well as such powers as the absorbed bodies possessed. The original powers are to be found in s. 2, sub-s. 1, of the Act of 1947. At the end of sub-ss. 1 and 2 are certain provisoes which constitute an immediate and direct illustration of the effect of the words " subject to the provisions of this Act ". Thus, a broad power to carry passengers by road would cover the running of taxi-cabs but the proviso to s. 2, sub-s. 1, excludes this. In addition to the original powers of their own, the commission have inherited powers from the previously existing bodies. The original powers are sufficient to entitle the commission to run the service in question.

As for the transferred powers, the board were invested with certain statutory powers by the Act of 1933. These included the power to carry passengers by road within the London Passenger Transport Board Area; but certain limitations were placed on this power. The legislature has, however, relieved the commission of the need to comply with part of these restrictions, in particular that relating to road service licences.

Sir David Maxwell Fyfe, K.C., in reply. By s. 2, sub-s. 8, of the Act of 1947, the commission may not disregard " any " enactment or rule of law ". As to the limits of the powers of a statutory corporation, see *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), *per* Lord Selborne, L.C., and *Wenlock* (*Baroness*) v. *River Dee Co.* (2). The capacity of the commission is that of a carrier of goods and passengers by rail and road, but nowhere in the Act are they expressly given running powers which can only be acquired by implication under one or other of the methods of taking over existing undertakings. In that sense the capacity which is created by s. 2, sub-s. 1, is subject to obtaining or acquiring running powers. The capacity to carry passengers is subject to the Act; the capacity of carrier is derived solely from the Act. The construction of the Act put forward by the executive is in direct contravention of s. 3, sub-s. 1, of the Act of 1947.

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(1) (1875) L. R. 7 H. L. 653, 693.

(2) (1885) 10 App. Cas. 354, 362.

As to s. 3, sub-s. 3, of the Act of 1933, when s. 15 of that Act was repealed the sub-section was frozen because its contingent fulfilment depended on subjection to provisions which had been repealed. The legislature did not contemplate an indiscriminate power of running omnibuses: it contemplated the three methods set forth in the opening of this appeal. The place of s. 15 in the Act of 1933 is taken by s. 65 in the Act of 1947, and the power to carry passengers does not become a right until it has been perfected under the Act itself. There is no reservoir of powers on which the commission can draw, and therefore one must see what powers the Act gives them. The power of the board to operate out of the "special area" was a contingent power depending on a process now extinguished so that it cannot be perfected or enforced; and s. 14, sub-s. 2, of the Act of 1947 does not transfer this right. It is to be noted that s. 3, sub-s. 1, of the Act of 1933 imposing on the board a duty to take steps to improve the facilities for passenger transport is repealed along with s. 15.

Their Lordships took time for consideration.

1951. March 1. LORD SIMONDS. My Lords, for some time before the commencement of the action out of which this appeal arises the appellant had operated a service of stage carriages between Hitchin and Weston in the county of Hertford. This he did under the authority of a road service licence issued to him by the Traffic Commissioners for the Metropolitan Area under s. 72 of the Road Traffic Act, 1930. On or about February 18, 1948, the respondents, whose origin and functions I will presently explain, started to operate a new service of stage carriages over the same route. The appellant, alleging that their action was unlawful and wrongful and that he had suffered damage thereby, on March 23, 1948, issued a writ against them claiming an injunction and damages. His action was dismissed by order of Vaisey, J., and his appeal from that order was dismissed by the Court of Appeal. So also in my opinion should his appeal to this House be dismissed.

Two questions are here involved: (1.) whether the British Transport Commission, a statutory body set up by the Transport Act, 1947, themselves had power under that Act to run the service in question subject only to the route being approved by the proper licensing authority, and (2.) whether, if they had that power, they effectively delegated it to the respondents. I will hereafter call the British Transport Commission "the commission" and the Transport Act, 1947, "the Act of 1947".

It is necessary to look back to the position in this area before the enactment of the Act of 1947. Under the London Passenger Transport Act, 1933 (which I will call "the Act of 1933") a board called the London Passenger Transport Board was set up with very wide powers of which I think it necessary only to mention (1.) that by s. 3, sub-s. 3, they were empowered subject to the provisions of the Act (inter alia) (*a*) to maintain, manage, carry on, extend and improve their undertaking, and (2.) that by s. 15 they were empowered (subject to the provisions of the said section) to provide road services of stage carriages on any of the following roads, but not otherwise, that is to say: (*a*) on any road within the area comprised within the continuous purple line shown on the deposited map (in the Act referred to as the "London Passenger Transport Area"); (*b*) on any road outside that area, being a road marked by broken blue lines or by broken yellow lines on the said map, provided that the board should not both pick up and set down a passenger on a road marked by yellow broken lines on the said map.

The route between Hitchin and Weston lies within the London Passenger Area save that for a distance of about 400 yards it lies outside that area but along a road marked by yellow broken lines. It is unnecessary to do more than mention that the same map marked another area surrounded by a black line. In this area, within which the route in question did not lie, the board had by virtue of other provisions of the Act of 1933 an effective monopoly of passenger road service. They had no such monopoly in the area lying outside the black line but within the purple line. On the contrary, as I have already said, the appellant was himself running a stage service in this area, and the board, if they wished to operate a similar service, were under the necessity of applying for and obtaining a road service licence from the Traffic Commissioners under s. 72 of the Road Traffic Act, 1930. They had in fact made their application on March 4, 1947, the appellant had lodged his objection to the grant and the matter had not been disposed of when on January 1, 1948, the Act of 1947 came into force. This, the respondents contend, altered the position. It was, they say, no longer necessary for the commission or for the respondents as its delegate to obtain a road licence but only to obtain a route approval, and this they obtained. It is necessary then to examine somewhat closely the provisions of the Act of 1947.

By s. 1 of the Act of 1947 the commission was set up. I need not further refer to its terms.

Section 2 is an important section, for it is on its provisions that the respondents in the alternative rely for the authority to operate the service in question.

The opening words of sub-s. 1 are " Subject to the provisions " of this Act, the commission shall have power ", words that are apt to enact that the powers thereafter given are subject to restrictions or limitations to be found elsewhere in the Act. The sub-section proceeds to enumerate the powers which are " (*a*) to " carry goods and passengers by rail, road and inland waterway, " within Great Britain; (*b*) to provide, within Great Britain, port " facilities and facilities for traffic by inland waterway; (*c*) to " store goods within Great Britain, whether or not those goods " have been or are to be carried by the commission . . . [but " subject to the conditions therein stated]; (*d*) to consign goods " . . .; (*e*) . . . to provide . . . hotels, . . . other living accommo- " dation and places of refreshment; (*f*) to provide . . . other " amenities and facilities [as respectively therein mentioned] ". The sub-section ends with a proviso " that the commission shall " not have power to carry passengers by road in a hackney " carriage " as therein described, a typical limitation on the generality of the power previously given. Sub-section 2 also opens with the words " Subject to the provisions of this Act " and proceeds to elaborate the powers given by sub-s. 1: it includes (*f*) power " to acquire by agreement . . . the whole or " any part of any undertaking of any other person . . . the " activities whereof are wholly or mainly such activities as are " specified in the said sub-s. 1 ": it too ends with limiting provisoes.

Sub-section 3 provides that: " Where, either by agreement " or otherwise, the commission acquire the whole or any part of " any undertaking of any other person, they may, subject to the " provisions of this Act " (the same words again) " carry on any " activities, whether mentioned in sub-s. 1 or not, which were " theretofore carried on for the purposes of that undertaking or " part of an undertaking or were authorized by any statutory "provision to be carried on for the purposes thereof". I pause to note, first, that this is prima facie an enabling sub-section and, secondly, that it is in the widest possible terms which do not suggest that the word "acquire" is limited to any particular mode of acquisition.

I pass over a number of sub-sections, observing only that in many of them there are limitations or restrictions upon the exercise of the preceding powers, and come to sub-s. 8, which is in these terms: "For the avoidance of doubt, it is hereby declared "that the preceding provisions of this section relate only to the "capacity of the commission as a statutory corporation, and "nothing in the said provisions shall be construed as authorizing "the disregard by the commission of any enactment or rule of "law". It is not very clear why it was necessary to insert this provision, for without it I do not see how the sub-section could be read as authorizing a disregard of the general law, but perhaps in the atmosphere of such an Act as this it might be thought wise ex abundanti cautela to make it clear that the commission were not omnipotent. In any event, reading the sub-section as a whole, I cannot regard it as supporting the view that the section is not an enabling one which by itself confers the powers enumerated in it.

Section 3, sub-s. 1, states the general duty of the commission. It is "so to exercise their powers under this Act as to provide, or "secure or promote the provision of, an efficient, adequate, "economical and properly integrated system of public inland "transport and port facilities within Great Britain for passengers "and goods with due regard to safety of operation". I pass over s. 4, which deals with the powers of the Minister in relation to the commission, and come to s. 5. This section provides for the setting up of a number of public authorities known as Executives, amongst which are the respondents, whose duties are as agents for the commission to "exercise such functions of the "commission as are for the time being delegated to them under "a scheme made by the commission and approved by the "Minister". Sub-section 10 of this section provides that: "In "addition to the powers exercisable by an executive by virtue of "any such delegation, every executive shall, except so far as the "commission may otherwise direct, have power, at the request "of the commission or of any other executive, to do, as agent for "the commission or that other executive, anything which the "commission or that other executive have power to do".

Section 6 sets up consultative committees and can be ignored.

Section 7, sub-s. 1, provides that: " Where the commission have " power under the preceding provisions of this Act to acquire " an undertaking or part of an undertaking by agreement, " the persons theretofore carrying on that undertaking may, " notwithstanding anything to the contrary in any statutory " provision or other instrument relating to their functions, make " and carry out agreements with the commission for the transfer " to the commission of the whole or any part of that under-" taking ". Very wide powers are given to the Minister to make regulations to give effect to this provision.

Part II of the Act, which begins with s. 12, provides for the vesting of existing undertakings in the commission with consequential provisions as to compensation and other matters. Amongst the undertakings so vested is that of the London Passenger Transport Board. Section 14 is of great importance and I set out parts of it. " (1.) The provisions of this section " shall, subject to the other provisions of this Act, have effect " where, under the preceding provisions of this Part of this Act, " the whole of the undertaking of any body is to vest in the " commission. (2.) Subject to the provisions of this section, all " the property of the body immediately before the date of trans-" fer shall vest in the commission and, as from the date of " transfer, the commission shall, to the exclusion of the body, " have all rights and be subject to all liabilities which the body " had or to which the body were subject immediately before the " date of transfer ".

I pause here to observe that I find neither in its immediate context nor in the general scheme of transfer any reason for limiting the meaning of the word " rights " in this sub-section. It must be construed to include all rights known to the law. Other sub-sections of this section were relied on by the appellant as pointing to some limitation but, having considered them, I have come to the conclusion that they have no such effect and I do not think it necessary to set them out.

So far, then, the Act has provided for the exercise of wide and diverse powers by the commission, the acquisition of undertakings by agreement, and the vesting of undertakings under the Act itself. It remains only to refer to a fasciculus of sections in Pt. IV of the Act dealing with passenger road transport. By s. 63, sub-s. 1 (which looks back to s. 3) it is provided that: " The commission may, at any time, prepare and submit to the " Minister a scheme as to the passenger road transport services " serving such area as may be specified in the scheme, being a "scheme devised for the purpose of promoting or facilitating the "promotion of the co-ordination of the passenger transport "services serving the area, whether by road or by rail, and the "provision of adequate, suitable and efficient passenger road "transport services to meet the needs of the area, and the com-"mission shall as soon as may be review the passenger road "transport services operating in Great Britain with a view to "determining the areas with respect to which schemes shall be "prepared and submitted as aforesaid".

Your Lordships were told that no schemes under this sub-section had as yet been prepared and submitted. It is clear from the terms of sub-s. 2 that the preparation of a scheme, involving the consultation with numerous bodies, including other persons providing passenger transport services who were likely to be affected by the scheme, would be a long and arduous task. Section 64 prescribes the contents of a scheme and I think it necessary only to note that it may provide for the constitution of bodies to provide services within the area and for the transfer to such bodies of undertakings within the area the activities of which consisted wholly or partly of operating such services and in that event for the compensation of the owners of the transferred undertakings. The relevance of this provision is that it appears that, if a scheme had been made affecting the area within which the appellant operates, he might have become entitled to some compensation.

Section 65 (the last section to which I shall refer) is of crucial importance. It provides by sub-s. 1 that: "Sections 72 to 76 of "the Road Traffic Act, 1930 (which relate to road service "licences) shall not apply to any passenger road transport service "provided, whether under a scheme under the preceding pro-"visions of this Part of this Act or otherwise, by the commission "or by any person acting as agent for the commission, but neither "the commission nor any such person as aforesaid shall use any "public service vehicle for the conveyance of passengers for hire "or reward at separate fares except (*a*) on a route approved, "as respects so much thereof as falls within any traffic area, by "the licensing authority for public service vehicles for that area; "and (*b*) in accordance with such restrictions as may be imposed "by that authority [as therein mentioned]". It is under this section that the respondents claim that they are authorized to operate the service now in question without obtaining a road service licence. They have satisfied the condition that the route must be approved by the licensing authority. It has been assumed that route approval does not involve the consideration of such questions as sufficiency of existing services and other matters which would be relevant if the grant of a road service licence were in issue. I am content to assume that this is so without deciding it. I am not influenced by this assumption in my consideration of the matter under appeal.

I have only to add that the Act of 1947 repeals the Act of 1933 except certain sections, of which s. 3, sub-s. 3, alone is relevant.

The first question, then, which I am now in a position to consider, is whether the commission could themselves operate the service in dispute. The respondents say that they could do so both under the general authority of s. 2, sub-s. 1, and as successors of the board under ss. 12 and 14, and in either case under s. 65 without obtaining a road service licence. The appellant says that on the true construction of the Act none of these sections gives the necessary authority.

To deal first with the scope and effect of s. 2, sub-s. 1, the appellant contends that this section does not of itself confer powers on the commission. His contention rests, I think, upon a meaning being given to the opening words " subject to the " provisions of this Act ", which they cannot bear. He would read them as equivalent to " in accordance with the provisions of " this Act " or " in such manner as is provided in this Act " and thus limit the exercise of the powers enumerated in the subsection to the specific methods for which provision is made in other sections of the Act. These he classifies as powers acquired on the acquisition of an undertaking by agreement (see s. 2, sub-s. 2 (*f*) and s. 7) rights transferred on the vesting of undertakings under s. 12 and powers embodied in a scheme made pursuant to s. 63. He fortifies this argument by reference to the general scheme of the Act, saying with some force that it is not consistent with a power in the commission to operate a service wherever it likes and, in the course of doing so, to drive other services off the road without compensation. But, though I am attracted by this argument, I find the words of sub-s. 1 of s. 2 too clear to admit of any doubt. The words " subject to the " provisions of this Act " which are repeated in sub-s. 2 and in sub-s. 3 are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found. And as I look through the several powers enumerated not only in sub-s. 1 but also in sub-ss. 2 and 3, I find again and again examples of powers given which are necessary for the proper exercise by the commission of their functions but are not specifically or by implication given by later provisions of the Act. I must therefore conclude that the commission has power to operate this service under s. 2, sub-s. 1. Had they, then, power to do so without obtaining a road service licence under the Act of 1930? Clearly, I think, they had. For I see no reason for narrowing down the plain meaning of the relevant words of s. 65, "provided, whether under a scheme "under the preceding provisions of this Part of this Act or other-"wise, by the commission". The service in dispute is provided by the commission "otherwise" than under a scheme. They are therefore relieved from the necessity of obtaining a road service licence.

But assuming that the appellant is right and the respondents wrong as to the scope of s. 2, sub-s. 1, the question would remain what are the powers of the commission as successors of the board? The undertaking of the board with all their rights (a word whose meaning in s. 14 I have already defined) was vested in the commission. Immediately before the transfer the board had certain rights to operate road services: so far as material they were defined in s. 15 of the Act of 1933 which I have already set out. This section was repealed by the Act of 1947, but by virtue of s. 14, sub-s. 2, of the latter Act the same rights were revived in the commission. But the rights which in the board were subject to the provisions of ss. 70 to 72 of the Road Traffic Act, 1930, were by virtue of s. 65 of the Act of 1947 freed from the fetters of those provisions as soon as they were vested in the commission. The position therefore clearly emerged that, whereas the board had to obtain a licence under the Act of 1930 and, subject to obtaining it, had the statutory right to operate the service, their successors, the commission, had the same statutory right but had no need to obtain a licence, though they had to obtain a route approval. It is true that in the result there is some duplication, inasmuch as the commission has a two-fold authority to operate the service in question. This is not surprising in legislation upon so intricate and complex a subject-matter. In any event it is not a result which should lead to a rejection of the plain meaning of any of the provisions of the Act. I have some doubt whether so far as the service extends for 400 yards along the road marked with broken yellow lines, the commission can derive their authority to pick up and set down passengers from any other source than s. 2, sub-s. 1, but for reasons that will appear I do not think it necessary to determine this.

I turn now to the second question. If, as I hold, the commission were empowered to run the service, have they delegated that power to the respondents? If they have not done so already, they can make good the defect by a stroke of the pen, but the point must now be decided, for it has a bearing upon costs and possibly upon damages. The issue turns on the meaning of a few words of the scheme of delegation which was approved by the Minister of Transport under s. 5 of the Act of 1947. Paragraph 2 of the scheme is in these terms: "This scheme applies to the "following activities of the commission: (a) activities which the "commission are empowered to carry on by virtue of the transfer "to them under Pt. II of the Act of the undertaking of the "London Passenger Transport Board; (b) activities which the "commission are empowered to carry on by virtue only of the "powers conferred upon them by s. 2, sub-s. 1, of the Act so "far as those activities are carried on in connexion with the "activities referred to in sub-para. (a) of this paragraph or are "ancillary to such activities . . .".

Paragraph 3 of the scheme is as follows:—"Subject to the "provisions of this scheme, the commission hereby delegate to "the executive the functions of this commission in relation to "their activities set out in sub-paras. (a) and (b) of para. 2 of "this scheme to the intent that, subject as aforesaid, all the "rights, powers and liabilities of the commission in connexion "with those activities shall be exercisable and dischargeable by "the executive . . .". There is nothing else in the scheme to which I need refer.

My Lords, I do not think that this is an occasion for too narrow an interpretation of an instrument. We have on the one hand the commission, a statutory body with, as I have decided and will assume, ample power to run the services in question or to delegate that power; on the other the executive, their delegate, who can fairly be assumed not to be acting without the knowledge and authority of its principal. The scheme of delegation is couched in language of wide generality. The terms of sub-paragraph (a) clearly include the right to carry on the service in question, except possibly in respect of the picking up and setting down of passengers over the 400 yards to which I have referred, and sub-paragraph (b) is in my judgment apt to fill that gap. It is, I think, manifest that the commission, faced with the physical situation and assumedly aware that as successors of the board they were not authorized to pick up and set down over the 400 yards, would assert the right to do so under s. 2, sub-s. 1, in connexion with the route which they were otherwise authorized to serve, and having done so could properly say that this activity was carried on " in connexion with " the activities inherited from the board or was ancillary to them. I am therefore of opinion that upon this question also the appeal fails.

I move accordingly that the appeal be dismissed with costs.

LORD NORMAND. My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the woolsack.

LORD OAKSEY. My Lords, the question of general importance on this appeal is whether the British Transport Commission (hereinafter called " the commission ") have power under the Transport Act, 1947, to carry passengers over any road in Great Britain upon obtaining from the licensing authority for public service vehicles for the area their approval of the route as a route but without obtaining a road service licence under ss. 72–76 of the Road Traffic Act, 1930, that is to say, without satisfying the licensing authority that the service is necessary or desirable in the public interest and without regard to the extent to which the needs of the proposed routes are already adequately served or the other considerations specified in s. 72 of that Act.

This is a question of the utmost importance both to the public and to those who are already operating road passenger services with the licence of the licensing authority, for if there is nothing unsuitable in the route or the class of vehicle proposed to be used the commission with their vast resources may use vehicles in competition with every private passenger road transport service in the country notwithstanding that the licensing authority may already have refused licences to other would-be competitors on that route. The question is whether this is the result of the true interpretation of the Transport Act.

The respondents' argument and the Court of Appeal's judgment are based principally upon the construction which they put upon s. 2, sub-s. 1, and s. 65 of the Transport Act, and the question appears to me to depend primarily upon the true construction of s. 2. If that section not only gives the commission " power " in the sense of " capacity " to carry passengers by road anywhere within Great Britain but also gives them the right to exercise that power, it is argued that this is a general right in addition to the specific rights to carry out schemes authorized under ss. 63 and 64 and to carry on undertakings which are vested in or purchased either compulsorily or by agreement by the commission in accordance with the express terms of the Act (see ss. 12–14, 16, 39, 47, 55, 63, 64).

Now, it is clear that in these specific ways, i.e., by vested undertakings, acquired undertakings and schemes, the commission can carry out the general duty imposed upon them by s. 3, but it is equally clear that in so far as by so doing they acquire or interfere with the rights of other operators of road services they must pay compensation: see especially s. 64, sub-s. 4. But the argument of the respondents is that, notwithstanding these express but qualified rights which enable the commission to provide road services anywhere in Great Britain, the commission can disregard them all and compete with any undertaking or individual already operating a road service by virtue of the powers conferred by s. 2 without paying any compensation. Such competition might be entirely opposed to the public interest, at any rate until the commission had driven their competitors from the field.

In my opinion this is not the true construction of the Act. The provisions of s. 2, sub-s. 1, are expressly interpreted by sub-s. 8 by the words "For the avoidance of doubt, it is "hereby declared that the preceding provisions of this section "relate only to the capacity of the commission as a statutory "corporation . . .".

My Lords, what other meaning can be given to these words but that power or capacity is conferred by this section but not the right to exercise the power? In my opinion sub-s. 8 means that the commission, being a statutory corporation and not an individual, have the capacity as an individual might have but not the right to exercise the powers so conferred. No other explanation of sub-s. 8 has been suggested and the respondents' argument, in my opinion, gives no meaning to the declaration that the provisions of s. 2 relate only to capacity. It is obvious that it is one thing to be capable of doing something; it is another to have the right to do it.

But then it is said that s. 65, which expressly excludes the road licensing provisions of the Road Traffic Act, 1930, negatives this interpretation by the provision in s. 65 of the Transport Act that: "Sections 72 to 76 of the Road Traffic Act, 1930, . . . shall not "apply to any passenger road transport service provided, whether "under a scheme under the preceding provisions of this Part of "this Act or otherwise, by the commission". My Lords, the words "or otherwise" are perfectly apt to refer to the other ways

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in which the commission may provide passenger road transport services under the specific terms of the Act, viz., by vested or acquired undertakings, and cannot, in my opinion, be construed to alter the construction of s. 2 of the Act. It is intelligible that, where the commission were operating a scheme approved by the Minister or an undertaking vested in or purchased by the commission, the licensing provisions of the Act of 1930 might be modified, but it seems to me impossible that it can have been intended to enable the commission to avoid the necessity of making schemes or acquiring existing undertakings by exercising the capacities or powers assumed to have been conferred by s. 2.

It is also contended that, apart from s. 2, s. 14 of the Act confers the right as successor to the London Passenger Transport Board to run over the Hitchin–Weston route, including the 400 yards in question, freed from the restriction to which the board was subject namely, not both to pick up and set down passengers thereon. In my opinion s. 14 has no such effect. By sub-s. 2 it expressly provides that "the commission shall . . . have all "rights and be subject to all liabilities which the body had or to "which the body were subject immediately before the date of "transfer". Now, there is no question that immediately before the date of transfer the London Passenger Transport Board had no right to pick up and set down on these 400 yards, and it appears to me, therefore, that this section does not confer that right.

Then it is contended by the respondents that they are entitled by virtue of s. 3, sub-s. 3, of the London Passenger Transport Act, 1933, which empowered the London Passenger Transport Board to extend their undertakings, when coupled with the repeal of s. 15 of that Act, to operate over these 400 yards without any restriction such as was imposed by the Act of 1933. In my opinion the words of s. 3, sub-s. 3, ought to be read in the same sense as they bore in the Act of 1933 when it was passed, and do not empower the commission to extend the undertaking of the London Passenger Transport Board outside the limits specified or to alter the condition of operation.

If the construction contended for by the respondents is correct, the commission can extend the undertaking of the London Passenger Transport Board all over England and disregard all the other provisions of the Act of 1947 by virtue of the vesting of the undertaking of the London Passenger Transport Board in the commission.

I agree with what the noble Lord on the woolsack has said on the question of delegation, but for the reasons which I have stated I think the appeal ought to be allowed so far as the 400 yards are concerned, and a declaration made that the respondents have no power both to pick up and set down passengers over the 400 yards referred to. As to the other part of the route, I agree with your Lordships that the commission have power to run the service as successors to the London Passenger Transport Board.

LORD MORTON OF HENRYTON. My Lords, I have had the advantage of reading in print the speech which has just been delivered by the noble Lord on the woolsack. I agree with it, and I do not desire to add any observations of my own.

LORD MACDERMOTT. My Lords, since February 18, 1948, the respondents, purporting to act as agents for the British Transport Commission, have operated a passenger omnibus service between Hitchin and Weston in the county of Hertford. The appellant, who has lawfully operated a passenger omnibus service on the same route for some sixteen years, challenges the right of the respondents to engage in this particular activity and, alleging loss and damage due to the respondents' competition, has brought the present proceedings for (inter alia) a declaration that the respondents have no statutory power or authority to operate the service carried on by them as aforesaid. In its substance the answer of the respondents is that the commission have power to run the service in question under the provisions of the Transport Act, 1947, and that they, the respondents, were duly authorized to exercise the functions of the commission respecting this service under a scheme of delegation made and approved in December, 1947, pursuant to the provisions of s. 5 of the said Act. The appellant's allegation of damage does not appear to have been actively contested and the respondents raise no point as to his right to sue.

The first question for determination, therefore, is whether the Act of 1947 empowered the commission to operate the service in dispute. The respondents contended for this power on two main grounds. First, they said that the Act of 1947 conferred upon the commission a broad power to run passenger road services on any highway in Great Britain, subject only to obtaining the approval of the appropriate licensing authority under s. 65; and that such approval (hereinafter called "route approval") had been duly granted in respect of the service now in question before it was started. And, secondly, they relied upon the provisions of the Act of 1947 under which the undertaking of the London Passenger Transport Board (hereinafter called "the board") and certain rights and powers relating thereto became vested in the commission, and submitted that in operating the said service they were but exercising a right which had belonged to the board and had been transferred to the commission by reason of those provisions.

The first of these submissions raises a matter of considerable general importance. It was based on that part of s. 2, sub-s. 1, of the Act of 1947, which reads: "Subject to the provisions "of this Act, the commission shall have power—(*a*) to carry "goods and passengers by rail, road and inland waterway, within "Great Britain; . . .".

Sub-section 8 of the same section was also relied upon. It reads: "For the avoidance of doubt, it is hereby declared that "the preceding provisions of this section relate only to the "capacity of the commission as a statutory corporation, and "nothing in the said provisions shall be construed as authorizing "the disregard by the commission of any enactment or rule of "law".

My Lords, the subsequent sections of the Act of 1947 contain certain provisions under which the commission obtain or may obtain limited or localized powers of operating road passenger services. They obtain such powers under Pt. II of the Act on the vesting of the undertaking of the board, as one of the bodies listed in Sch. III. They may also acquire a passenger road transport undertaking by agreement under s. 2, sub-s. 2 (*f*), and, having done so, may be empowered by the Minister to carry on the undertaking. That is under s. 7, sub-s. 2, which says—and this is of interest having regard to the nature of the right claimed under s. 2, sub-s. 1 (*a*)—"Where any such agreement is made, "the Minister may make regulations for enabling the under-"taking or part of an undertaking to be carried on by the com-"mission in lieu of the persons theretofore carrying it on . . .". And again, the elaborate provisions of ss. 63 and 64 as to the preparation and approval of area passenger road transport schemes (which may be promoted to meet the needs of any area in Great Britain) empower the Minister to specify the body or bodies to provide services for the area embraced in the scheme, and enact (s. 64, sub-s. 2) that the commission "may be the "body specified, or one of the bodies specified".

With these enabling provisions in mind counsel for the appellant submitted that the initial words of s. 2, sub-s. 1—"Subject "to the provisions of this Act"—should be read as referring thereto and as meaning "in accordance with the provisions of "this Act". I am not inclined to accede to that argument in so far as it is based merely on the meaning to be ascribed to the opening phrase. That is an expression commonly used to avoid conflict between one part of an enactment and another, and I have difficulty in reading into it more than it says. But greater weight should, I think, be attached to the wider submission that the whole scheme and policy of the Act, as manifested by its terms, are such as to impose upon s. 2, sub-s. 1 (*a*), very much the same kind of qualification.

The drafting and arrangement of the Act are not, as it seems to me, what one would expect if, behind all the special provisions under which power to run passenger road services for particular areas is or may be conferred on the commission, there exists all the time the general and pervading power for which the respondents contend. See, for example, the enabling provisions of s. 7 to which I have already referred.

Again, when one considers the duties of the commission under s. 63 regarding the preparation and submission of area schemes for passenger road transport services, there is, to my mind, difficulty in thinking that the legislature intended to confer upon the commission a general power to provide such services anywhere, subject only to securing route approval under s. 65. The provisions of s. 63, sub-s. 2, which direct the commission, before submitting a scheme, to consult, amongst others, "any other "person providing passenger transport services who, in the "opinion of the commission, is likely to be affected by the "scheme", and the provisions of s. 64, sub-s. 4, for the payment of compensation to a person whose passenger undertaking is not taken over but whose road services within a scheme area are prohibited or restricted by the scheme, appear to me strangely at variance with a power by which the commission, if they so choose, can, without any scheme or any compensation, enter into competition with a duly licensed private undertaker and use their enormous resources to drive him off the road. I do not suggest that that is the policy of the commission or that their operation of a service upon the route now in question is inspired by anything other than a desire to meet the public need. But, if the respondents are right, the fact remains that the power to act in this way exists and could be exercised over a very wide field.

This consideration would lose some of its force if the legislature had provided means whereby the commission's alleged right to run passenger road services at large could be effectively controlled so as to ensure that the public need in the area served by any route was met without a superfluity of services or wasteful competition with existing undertakings. Sections 72 to 76 of the Road Traffic Act, 1930, were enacted to provide that sort of control throughout Great Britain and did so by a road service licensing system administered by Traffic Commissioners (now renamed for each area " the licensing authority for public service " vehicles ") whose duties, so far as relevant, are set out in s. 72, sub-s. 3. The material part of this sub-section reads thus: " The commissioners . . . in exercising their discretion to grant " or to refuse a road service licence in respect of any routes and " their discretion to attach conditions to any such licence shall " have regard to the following matters:—(*a*) the suitability of " the routes on which a service may be provided under the " licence; (*b*) the extent, if any, to which the needs of the pro- " posed routes or any of them are already adequately served; " (*c*) the extent to which the proposed service is necessary or " desirable in the public interest; (*d*) the needs of the area as a " whole in relation to traffic (including the provision of adequate " suitable and efficient services, the elimination of unnecessary " services and the provision of unremunerative services), and the " co-ordination of all forms of passenger transport, including " transport by rail; and take into consideration any representa- " tions which may be made by persons who are already providing " transport facilities along or near to the routes or any part " thereof or by any local authority in whose area any of the routes " or any part of any of the routes is situate ".

But by s. 65, sub-s. 1, of the Act of 1947 ss. 72 to 76 of the Road Traffic Act, 1930, are not to apply to services provided by the commission or their agents and, instead of the former road service licence, the commission or their agents must obtain from the licensing authorities concerned what I have already referred to as route approval. In giving such approval the authorities, who are not placed under any obligation to consider representations by interested persons, may impose restrictions as to the class of vehicle to be used and as to where passengers may be taken up or set down on the route approved. I am by no means clear as to the precise considerations which the licensing authorities should have regard to in deciding to grant or withhold route approval, but the parties did not attempt to construe s. 65, sub-s. 1, as providing, in a new form, the kind of control of transport facilities secured by ss. 72 to 76 of the Act of 1930, and were at one, as I followed the arguments, in saying that route approval was directed to little, if anything, more than road conditions. I think there is much to be said for that view and I shall assume it to be correct. But if so, there is nothing in s. 65, sub-s. 1, to meet the difficulties regarding the respondents' construction of s. 2, sub-s. 1 (*a*), to which I have referred.

That view of s. 65, sub-s. 1, raises another consideration, also pointing, as it seems to me, against that construction and the extensive powers which flow from it. It must not be forgotten that the Act of 1947 does not purport to nationalize the road passenger transport industry. Section 72 of the Act of 1930 still applies throughout most of Great Britain and the licensing authorities thereunder have still, in the exercise of their licensing powers, a duty which, to put it shortly, is to maintain a proper and ordered balance between the public need and the facilities available. They can, for example, refuse a licence on the ground that the route on which the applicant desires to run is already adequately served. But if the commission have the wide powers said to be conferred by s. 2, sub-s. 1 (*a*), of the Act of 1947, and route approval under s. 65, sub-s. 1, thereof has nothing to say to the needs of the public or the avoidance of redundant services, then, as it appears to me, the whole vital policy of s. 72 of the Act of 1930 is invaded and the power of the licensing authorities to regulate services according to requirements is seriously impaired. It would, indeed, be strange if the commission had power to run a service along a route which the licensing authority considered adequately served and in respect of which it had for that reason already refused to grant further licences. I am not satisfied that the legislature intended to render such a situation generally possible or to encroach to such an extent upon the province and functions of the licensing authorities.

It is true that under s. 3, sub-s. 1, of the Act of 1947 there is laid upon the commission the duty so to exercise their powers "as to provide, or secure or promote the provision of, an efficient, "adequate, economical and properly integrated system of public "inland transport" in Great Britain; but their views as to what is adequate, etc., in relation to road passenger services may not be those of the licensing authorities, and if the commission have the right to provide such services throughout Great Britain as now claimed, there arises a possibility of conflict in the traffic areas which one would not expect from a measure such as the Act of 1947. I do not forget that in s. 65, sub-s. 1, route approval is substituted for a road service licence in respect of any service provided by or on behalf of the commission " whether under a " scheme . . . or otherwise ", and that the respondents laid stress on the words " or otherwise ". I would agree that these words are wide and apt to embrace all the powers to provide road services which the commission may possess. But I do not think they fortify the respondents' claims as founded on s. 2, sub-s. 1 (*a*), for they are sufficiently explained and satisfied by powers conferred by the vesting provisions and by regulations made under s. 7. The application of s. 65, sub-s. 1, to these latter powers and to those conferred by area schemes would, no doubt, oust the jurisdiction of the licensing authorities to some degree, but the effect would be of minor importance compared with that which would result were the commission armed with general running rights; and it is also to be observed that the specific powers, relating as they do to existing undertakings, vested or to be acquired, or to area schemes, must necessarily be concerned with what has already been or will in future be regarded by some competent authority as in the public interest.

My Lords, it is trite law that general words in a statute have to be read with reference to the subject-matter and design of the legislation and may on occasion be restricted or reduced in their generality thereby. As Viscount Haldane said in *Viscountess Rhondda's Claim* (3), " General words have, of course, on " occasions been given by the courts restricted interpretation. " But that has been only when the scheme of the statute read as " a whole, or the special character of the purpose as expressed " by the legislature in the statute itself or in some other statute " or law on which it bears, indicates such a restriction as intended " by the legislature itself ". Now, it seems to me that the considerations to which I have referred indicate that the legislature did not intend to confer on the commission general running powers throughout Great Britain in respect of passenger road services. And if that is so, I think the only alternative to the respondents' interpretation is to construe s. 2, sub-s. 1 (*a*), as endowing the commission, in relation to such services, with but the capacity to exercise the carrying rights which are or may be granted under the subsequent provisions of the Act.

It may be added in support of this construction that, though no doubt placing a restriction on general words, it but repeats a similar restriction which must, in my opinion, necessarily attach to the equally general language of the section as applicable to carriage by rail and inland waterway. For, despite the powers to construct what is needed for their activities and to buy land which are conferred on the commission by paras. (*a*) and (*c*) of sub-s. 2 of s. 2, I do not think it could be contended that sub-s. 1 (*a*) authorized the commission to do more in the way of constructing new railways and new canals and running services thereon than the undertakers named in Sch. III to the Act could have done. In short, there seems to be no power under s. 2, sub-s. 1 (*a*), to operate specific services by rail or inland waterway apart from the subsequent provisions of the Act as to vesting. Sub-section 8 of s. 2 also appears to me to lend support to the construction I favour. I think it makes plain that the function of the section is to clothe the new corporate body with the vires needed to exercise the rights and discharge the duties that are subsequently provided for and to do all that is ancillary and incidental thereto. It is, so to speak, the commission's charter, sustaining rather than extending the activities described or contemplated in what follows.

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(3) [1922] 2 A. C. 339, 383.

I am, accordingly, of opinion that the operation of the service complained of cannot be justified on the ground that it is authorized by s. 2, sub-s. 1 (*a*). I turn therefore to inquire if such justification is to be found in the respondents' second submission which is grounded upon the effect of the vesting in the commission of the undertaking of the board by the Act of 1947.

It was conceded that the board were one of the bodies referred to in s. 12 of that Act and, in consequence, that their entire undertaking was transferred to the commission on the date stated in that section as the date of transfer, namely January 1, 1948. The board were established and their undertaking constituted by the London Passenger Transport Act, 1933. Section 3 thereof must be referred to. Sub-section 1 of that section laid down the general duty of the board to provide an adequate and properly co-ordinated passenger transport system for the London Passenger Transport Area. Sub-section 2 provided for the unification of the board's undertaking. Sub-section 4 enacted that the undertaking was to be conducted so as to secure that revenue was sufficient to defray revenue charges. And sub-s. 3 says that: "Subject to the provisions of this Act, the board may in the "exercise of their duty as aforesaid—(*a*) maintain, manage, carry "on, extend and improve their undertaking; . . .". Section 15 is also important. It conferred power on the board to run certain public road services. Its opening words are: "(1.) Subject to "the provisions of this section, it shall be lawful for the board

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"to provide road services of stage and express carriages on any "of the following roads, but not otherwise, . . .". The full detail of the roads mentioned need not be set out. It will suffice to say that they included (*a*) the roads within the London Passenger Transport Area, and (*b*) certain roads outside that area and marked yellow on the signed map. Sub-section 1 of s. 15 enacted, inter alia, that the board should not both pick up and set down a passenger on any of these "yellow" roads; and sub-s. 3 provided that ss. 72 to 76 of the Act of 1930 should not apply to any of the roads at (*a*) above which were also within the London Traffic Area, or "special area" as it was called therein.

It will now be convenient to consider the situation under these provisions in relation to the route in question as on December 31, 1947, that is, the day before the date of transfer. The route lay entirely outside the special area, and entirely within the London Passenger Transport Area save for one short stretch of 400 yards outside that area and along a "yellow" road. The board were therefore, immediately before the date of transfer, authorized by s. 15 to run passenger road services along this route subject to the restriction, imposed by that section, about picking up and setting down on the 400 yards of "yellow" road, and subject also, as respects the whole route, to obtaining a road service licence under the general law as enacted in ss. 72 to 76 of the Act of 1930. The board had applied for a road service licence for the said route but had not obtained it by the date of transfer. Thereafter the respondents applied for and obtained route approval for the same route.

Section 14 of the Act of 1947 deals with the consequences of the vesting of the undertakings of the board and other bodies in the commission, and sub-s. 4 has the effect, as regards the board, of substituting for references thereto in the Act of 1933 a reference to the commission as respects anything falling to be done on or after the date of transfer. Now that might have placed the commission firmly and without question in the shoes of the board had the material provisions of the Act of 1933 continued unimpaired. That, however, did not happen, for the Act of 1947 repealed s. 15 of the Act of 1933 in toto, as well as all of s. 3 save sub-s. 3 thereof, and this repeal was as from January 1, 1948. Section 14, sub-s. 4, of the Act of 1947 cannot, therefore, operate to clothe the commission with the rights conferred on the board by s. 15 of the Act of 1933. It was, if I have gathered the argument aright, contended by the respondents that the application of s. 3, sub-s. 3, of the Act of 1933 to the commission, when read in relation to the board's undertaking as defined by that Act, was effective to transfer the running rights conferred by s. 15. I do not think this is sound. Section 3, sub-s. 3, still means, presumably, what it meant before s. 15 was repealed, and I do not see any ground for saying that the rights so specifically granted by s. 15 could at any time have also been spelt out of s. 3, sub-s. 3. I therefore do not think that s. 14, sub-s. 4, sustains the respondents' case.

The same difficulty does not arise on the wording of sub-s. 2 of s. 14 which must now be examined. It reads as follows: "Subject to the provisions of this section, all the property of the "body immediately before the date of transfer shall vest in "the commission and, as from the date of transfer, the commission shall, to the exclusion of the body, have all rights and be "subject to all liabilities which the body had or to which the "body were subject immediately before the date of transfer".

In my opinion the word "rights" in this sub-section must be given its general meaning and cannot be limited to rights which are of a proprietary nature. If so, the question is whether the board on *December 31, 1947*—that is *before* the date of transfer and the repeal of s. 15—had a "right" to provide an omnibus service along the route in dispute. In my opinion they had. It is true, this route being outside the special area, that the board could not make use of that right until they had obtained a road service licence in respect of the vehicles to be employed. But I do not think this means that the board had no relevant right under s. 15, for the purposes of s. 14, sub-s. 2, of the Act of 1947, before such a licence was granted. In the popular sense of the word, "rights" may be qualified as well as absolute, and it seems to me that before the date of transfer it would have been entirely correct to say that the board had a right under s. 15, in respect of this route, which they would not have had had it lain outside the areas and roads therein particularized. I am accordingly of opinion that the effect of s. 14, sub-s. 2, of the Act of 1947 was to transfer to the commission the rights of the board under s. 15 of the Act of 1933 in regard to the route under discussion, and that it was open to the commission, or their duly authorized agents, to perfect those rights and make them capable of immediate enjoyment by obtaining (as was done) the route approval required by s. 65, sub-s. 1. I do not think the rights over this route have been transferred to the commission otherwise, and it would therefore seem, if I am correct in my views regarding s. 2, sub-s. 1 (*a*), that on the 400 yards along the "yellow" road the commission and the respondents (if entitled to exercise the commission's powers) are still subject to the restriction as to both picking up and setting down which was expressly imposed by s. 15 of the Act of 1933. This consideration serves to point the distinction between general powers and the special powers which I have already drawn; but, as I understand the appellant's case, it does not affect the outcome of this appeal. What the appellant has disputed throughout is the right of the respondents "to operate a road passenger transport service of "stage carriages along the route between Hitchin and Weston "and Weston and Hitchin" and I do not think this minor restriction really concerns him if the respondents are otherwise entitled to operate a service along that route.

I come now to the scheme of delegation. Does it authorize the respondents to run this service on this route as the commission might have done? I think the answer must be in the affirmative if this activity falls within para. (*a*) of cl. 2 of the scheme. That paragraph runs thus: "(*a*) activities which the "commission are empowered to carry on by virtue of the transfer "to them under Part II of the Act of the undertaking of the "London Passenger Transport Board". Part II of the Act of 1947 includes s. 14 and, if I am right in what I have already said as to the effect of sub-s. 2 thereof, I think it must follow that the activity in dispute comes within this paragraph. If, as I consider, the commission were put in a position to apply for the necessary route approval because s. 14, sub-s. 2, gave them the board's rights under s. 15 of the Act of 1933, I can see no good ground for saying that the words "by virtue of the transfer" are not satisfied.

For these reasons I think the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Mawby, Barrie and Letts; M. H. B. Gilmour.*

WHITE AND OTHERS . . . . APPELLANTS; J. C.*

AND 1951

KUZYCH . . . . RESPONDENT. *June* 20.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Trade Union—Alleged offences by member against union policy—Domestic trial—Expulsion resolution—Appeal provisions in byelaws—Contractual obligation not to resort to suit at law before all appeal remedies exhausted—Breach.

The respondent, a member of the appellant trade union, was found guilty by the press and investigating committee of the union on certain charges alleging offences committed by him in breach of art. 26 of the byelaws of the union—including a charge of having committed acts "discreditable to it in publicly opposing established policies of the union by campaigning against the closed-shop principle". In compliance with art. 26 the report of the trial committee was brought before a general business meeting of the union which, by vote, accepted the report and passed a resolution expelling the respondent from the union. Art. 26 of the byelaws also provided that if a member so found guilty by a general business meeting "feels that the decision is unfair, or the penalty too severe, he may, within sixty days, file an appeal in writing with the executive of the Shipyard General Workers' Federation . . .". By the oath of obligation taken by a member of the union, and by which, under art. 22 he was contractually bound, he promised "that I will not become a party to any suit at law or in equity against this Union or the Federation, until I have exhausted all remedies allowed to me by said Constitution and byelaws". The respondent, without first appealing to the federation from the findings in the report and the resolution of expulsion, instituted the present action for a declaration that he had not been validly expelled from membership of the union. He contended, inter alia, that the conclusion reached by the general business meeting should not be regarded as a "decision", on the ground that, it was alleged, it was arrived at by methods which made it contrary to natural justice and that it was the result of bias and even intimidation.

Held, that "decision" in the byelaw meant "conclusion". The conclusion reached by the general meeting was a "decision" within the meaning of that expression in the byelaws even if it was tainted by bias or prejudice or arrived at in defiance of natural justice, and even if the voting of some members might have been affected by intimidation. Accordingly, the conclusion reached by the general meeting was subject to appeal to the federation, and that was the

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* *Present*: VISCOUNT SIMON, LORD PORTER, LORD MORTON OF HENRYTON, LORD REID and LORD ASQUITH OF BISHOPSTONE.

J. C.
1951

WHITE
v.
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appeal which the respondent was bound by his contract to pursue before he could issue his writ.

Quære, whether the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, is appealable, or is simply void and not subject to appeal at all.

Majority judgment of the Court of Appeal for British Columbia reversed.

APPEAL (No. 1 of 1951) from a majority judgment of the Court of Appeal for British Columbia (May 3, 1950) which had affirmed a judgment of the Supreme Court of British Columbia (Whittaker, J.) (September 22, 1949) whereby a resolution of the appellants, the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, expelling the respondent, Myron Kuzych, a welder, from the union was declared to be illegal and void.

The respondent, who was opposed to the "closed shop" principle which was part of the policy of the union, was charged by a member with having, inter alia, in breach of art. 26 of the byelaws of the union, "committed acts discreditable to it in "publicly opposing established policies of the union by cam- "paigning against the closed-shop principle". The charges were heard by the press and investigating committee of the union, when the respondent attended and gave evidence and was cross-examined. The committee were unanimous in finding him guilty of the charges against him; and when their report, in accordance with the byelaws, came before a general business meeting, the latter passed a resolution expelling the respondent from the union.

Byelaw 26 also contained the provision, under "Appeals", that "if a member has been found guilty by a general business "meeting of any offence . . . and feels that the decision is unfair, "or the penalty too severe, he may, within sixty days, file an "appeal in writing with the Executive of the Shipyard General "Workers' Federation; . . .".

The oath of obligation taken by members, as provided in art. 22 of the byelaws, and by which under art. 22 they were contractually bound, was as follows:—"I promise that I will not "become a party to any suit at law or in equity against this "union or the federation, until I have exhausted all remedies "allowed to me by said constitution and byelaws".

The respondent, without having appealed to the federation against the resolution expelling him, brought the present action against the appellants (who represented the union) for a declaration that he had not been validly expelled from the union.

The judgment of Whittaker, J., in the Supreme Court, which the Court of Appeal for British Columbia (O'Halloran, Robertson and Sidney Smith, JJ.A., Sloan, C.J., and Bird, J.A., dissenting) confirmed, so declared, and awarded the respondent $5,000 as damages.

1951. Apr. 24, 25, 26, 30; May 1, 2. *J. W. de B. Farris, K.C.*, and *N. T. Nemetz, K.C.* (both of the Canadian Bar) for the appellants. The appeal is based on the following grounds: (i) The trial committee was properly constituted—it was so found by the Court of Appeal. (ii) The respondent received a proper and fair hearing before the press and investigating committee. (iii) The trial proceedings were not contrary to natural justice and void. (iv) The expulsion of the respondent was not by the committee, but by a general meeting of the union, which was fairly conducted and in accordance with the byelaws. (v) The prejudice of one member of the trial committee did not invalidate the proceedings at the general meeting. (vi) The respondent did not have an indefeasible right to become and remain a member of the union, which had jurisdiction to expel a member in accordance with its rules. (vii) The alleged wrongful actions of the union in the expulsion proceedings were properly reviewable by the executive committee of the Shipyard General Workers' Federation on appeal as provided by the constitution and byelaws of the union. (viii) The respondent was precluded from bringing an action until he had exercised his rights of appeal, because, (a) his action was contrary to his contractual obligations to his union, and (b) the courts will not interfere with the internal operations of the union until the complainant has exhausted his remedies as provided by the constitution and the byelaws. (ix) The damages are excessive and awarded on the wrong principle.

With regard to the general attitude of the respondent towards the union, the crux of the charges against him was the closed-shop point. As was said by Macfarlane, J., in *Kuzych* v. *White* (1): "he says that he was an unwilling member of the "union . . . he is opposed to a closed shop on principle, and is "going to tolerate it only so long as he has to". And in his judgment in the Court of Appeal, Sidney Smith, J.A., said that: "the union's counsel has relied strongly on the views of "bias expressed in *Maclean* v. *Workers' Union* (2), where

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(1) [1947] 1 W. W. R. 322, 334. (2) [1929] 1 Ch. 602.

"Maugham, J., pointed out that conduct of a person charged "might well be such that every other member of the union "might have a strong animus against him. Counsel gave point "to this by reading evidence showing that the plaintiff has not "only proved a turbulent and unruly member, but had indulged "in acrimonious criticism and even abuse of the union and its "policies generally, so that personal bias and strong dislike from "the committee was nothing more than he could expect".

There have been a number of authorities on the jurisdiction of the court to intervene in such cases as the present. It was decided in *Dawkins* v. *Antrobus* (3) that "the court will not "interfere against the decision of the members of a club "professing to act under their rules unless it can be shown either "that the rules are contrary to natural justice, or that what has "been done is contrary to the rules, or that there has been mala "fides or malice in arriving at the decision". The only malice here was knowledge of the matters which were the subject of the charges. The mere fact that the members had some knowledge in advance, or, perhaps, knew all about the matter, was something which could not preclude them from coming to the determination that the respondent should be expelled.

In *Maclean* v. *Workers' Union* (4) it was held that the court has no jurisdiction to vary or set aside the decision of a domestic tribunal if in giving its decision the tribunal has acted honestly in accordance with its own rules and in good faith. The Court of Appeal below in the present case would appear to have erred in relying on the cases concerning bias of justices referred to in *Maclean's* case (4). Indeed, in *Russell* v. *Duke of Norfolk* (5) it was said: "this matter is not to be judged by the standards "applicable to local justices. Domestic tribunals of this kind are "entitled to act in a way which would not be permissible on the "part of local justices sitting as a court of law . . . one essential "is that the person concerned should have a reasonable opportunity of presenting his case". In the light of *O'Reilly* v. *Gittens* (6) [to which Lord Morton drew attention] the issue in the present case is narrowed down to the question whether it has been established that there was not a fair trial. In that connexion it may be observed, firstly, that the respondent was tried not by an ad hoc committee, but by what was the regulation standing press and investigating committee of the organization.

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(3) (1881) 17 Ch. D. 615.
(4) [1929] 1 Ch. 602.
(5) [1949] 1 All E. R. 109, 118.
(6) P. C. App., No. 96 of 1946 (unreported).

Secondly, he was given full notice in writing of the charges. Thirdly, he attended and was given a memorandum of the trial procedure before the trial. Fourthly, he knew that he was entitled to have a union man as a lay counsel. Fifthly, he himself cross-examined the witnesses; he admitted that he was given a courteous hearing. Lastly, the time taken was from 7.30 p.m. to midnight. The decision was in writing, and has in itself all the earmarks of the culmination of a considered and fair trial.

A reasonable finding is worth-while evidence that the men were not biased in coming to their decision. There is nothing in the hearing or in the decision reached on which the slightest argument can be founded that the committee must have wandered from the true principles of justice.

[Sections of the evidence were then read which, counsel submitted, substantiated the submissions which he had made in opening, and he referred to *Jackson* v. *Barry Railway Co.* (7).]

On the question of the appeal to the executive of the Shipyard General Workers' Federation, it is submitted that, whether the proceedings before the trial committee and the general meeting were regular, void or voidable, the intent of the contractual obligation is the same. The test is whether, if the appeal had been taken in this case, the federation would have jurisdiction to remedy any unfairness that may have existed. It is clear that the appeal so-called would be by way of a re-hearing. If they had jurisdiction to reinstate him, then from the standpoint of a group of workmen the complete purpose of the provision would be met—to keep matters of this kind under domestic control and out of the hands of the courts. It was held in *Essery* v. *Court Pride of the Dominion* (8) that " members of charitable and provident " societies should not be allowed to litigate their grievances " within the society in courts of law until they have exhausted " every possible means of redress afforded by the internal " regulations of their societies ". [Reference was also made to *Canadian Land and Emigration Co.* v. *Municipality of Dysart* (9), *Field* v. *The Court Hope of Ancient Order of Forresters* (10), and *Kemdrer* v. *Standard Stock Exchange* (11).]

With regard to damages, the only ground on which damages could be based was for loss of time. The respondent refused to accept other suitable employment of the same nature which was open to him, and he has suffered no damage.

(7) [1893] 1 Ch. 238, 246.

(8) (1883) 2 O. R. 596.

(9) (1885) 12 O. A. R. 80, 83.

(10) (1879) 26 Grant's Ch. R. 467, 475–6.

(11) (1927) 32 O. W. N. 296.

A. W. Johnson (of the Canadian Bar) for the respondent. The constitution of the union is referred to in *Stephen* v. *Stewart* (12). It must be admitted that the respondent is bound by the byelaws. By the oath of obligation, however, he does not agree to accept any finding: it must be a proper finding reached after a proper trial. The press and investigating committee which purported to try the respondent included one Clark, who was proved to have had such a bias against the respondent as to disqualify him from acting on the committee in respect of the charges against the respondent. The decision of the committee must be considered to be void. It is submitted that, because of bias and intimidation, the respondent was not able to present his case properly, and that the decision arrived at, which was accepted by the general business meeting, was contrary to natural justice and was no decision at all. There was thus no " decision " within the meaning of byelaw 26 from which the respondent could appeal to the federation. A complainant must have an opportunity of presenting his case adequately to bring himself within the authorities. If something is done " in violation of the rules of " the society ", that makes the decision void: *Essery* v. *Court Pride of the Dominion* (13); *Dawkins* v. *Antrobus* (14); *Caven* v. *Canadian Pacific Ry.* (15); *Crisp* v. *South African Council of the Amalgamated Engineering Union* (16).

The law as respects trade unions has developed very much along the same lines in the United States of America as in Canada, and there is a statement which may be of some interest in Corpus Juris, vol. 63, para. 58: " Because loss of wages " resulting from the expulsion of a member from a union con- " stitutes a property right, one so wrongfully expelled from a " union need not exhaust his internal remedies before presenting " a suit for damages against the union or those causing his " expulsion ". And in *Tesoriero* v. *Miller* (17) it was held that if no relief would result from the prosecution of the appeal available to an ousted union member within the union, then the courts will intervene to take jurisdiction.

An appeal to the Shipyard General Workers' Federation executive would have been futile as that body had given autonomy over its members to the union. A number of other decisions in

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(12) (1943) 59 B. C. Rep. 410.

(13) 2 O. R. 596, 608.

(14) 17 Ch. D. 615.

(15) (1926) 95 L. J. (P. C.) 23, 25. 27.

(16) (1930) S. A. L. R. (A. D.) 225, 236.

(17) (1949) 88 N. Y. Supplmt., 2nd, 87.

Ontario which were subsequent to *Essery's* case (18) appear generally to support it. Cases concerning the natural justice point are *General Medical Council* v. *Spackman* (19), where Lord Wright, after referring to a number of authorities, said that: " if " the principles of natural justice are violated in respect of any " decision, it is, indeed, immaterial whether the same decision " would have been arrived at in the absence of the departure from " the essential principles of justice. The decision must be " declared to be no decision "; and *Thomson* v. *British Medical Association* (*N. S. W. Branch*) (20), where it was said that " the " councils were . . . acting . . . in a judicial or quasi-judicial " character. Action of that character should be above suspicion. " A person having such duties to discharge disqualifies himself " from performing them, vitiates the composition of the body of " which he forms part, and renders their decision illegal and void, " if he . . . is biased to such an extent as to render him other " than an impartial judge ". The respondent's purported expulsion from the union was unlawful. He was not bound in law to take an appeal to the domestic tribunal—the executive of the federation—before beginning his action in the courts.

There remains a further point on the constitution of the press and investigating committee of the union. That committee was not properly constituted, not having been elected in accordance with the rules of the union, and therefore its decisions and recommendations relating to the charges against the respondent were unconstitutional and invalid. That is the line on which the trial judge based himself. As to damages, they were not excessive. One of the main objects in the present case was the malicious purpose of getting the respondent out of the union and depriving him of his job: see *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (21); *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* (22).

J. W. de B. Farris, K.C., in reply. What has to be interpreted here is what a group of working men, not trained in law, would mean when they say to their brother: " if you feel that you " have not been treated fairly—that the decision is unfair—you " may appeal to the federation ". That should be given its widest meaning, and when the matter comes before the appellate tribunal the field is wide open. [Reference was made to *Rex* v. *Nat Bell Liquors Ld.* (23), *Canadian Land and Emigration Co.* v.

(18) 2 O. R. 596.
(19) [1943] A. C. 627, 644.
(20) [1924] A. C. 764, 780.
(21) [1903] 2 K. B. 600.
(22) [1942] A. C. 435.
(23) [1922] 2 K. B. 128, 151.

Municipality of Dysart (24), *Jonesco* v. *Beard* (25), and *Hip Foong Hong* v. *N. Neotia & Co.* (26).] The whole intent and purpose of the byelaws in the present case is that the appeal should be broad enough to rectify any injustice that may have been done. There has been no express finding of intimidation at all in this case.

June 20. The judgment of their Lordships was delivered by VISCOUNT SIMON. This is an appeal by the defendants in the action from a judgment of the Court of Appeal for British Columbia, dated May 3, 1950 (O'Halloran, Robertson, and Sidney Smith, JJ.A., Sloan, C.J. and Bird, J.A., dissenting) which dismissed the appellants' appeal from a judgment of Whittaker, J., dated September 22, 1949, in the respondent's favour. The litigation has involved the examination of a mass of evidence and the discussion of a number of difficult questions arising therefrom, but, as will appear in the sequel, the conclusion to be reached is arrived at by an overriding consideration, which makes it unnecessary to pronounce on some of the other issues that have been raised.

The respondent is a welder. He became a member of the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1 (hereinafter referred to as "the union") in April, 1943. He has brought this action for a declaration that he has not been validly expelled from membership of the union, but is still a member of it in good standing, and for consequential relief. The judgment of Whittaker, J., which the Court of Appeal by a majority confirmed, so declared and awarded him $5,000 as damages.

The union had a contract with North Vancouver Ship Repairs Ld., at whose shipyard the respondent worked, one of the terms of which was that only members of the union would be employed. Such a contract constituted the shipyard a "closed shop". According to the witness Stewart, who had been a member of the union since 1942 and was an ex-president, the principle of the "closed shop" was the policy of the union since its inception. One of the objects and purposes of the union, as stated in its byelaws dated August 8, 1944, was "to consummate closed shop "agreements in order to establish an equitable and lasting relation-"ship with employers". The respondent was, and is, opposed to the principle of the closed shop and expressed himself, both before and at the trial of this action, as regarding it as "a very

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(24) 12 O. A. R. 80, 83.

(25) [1930] A. C. 298.

(26) [1918] A. C. 888, 894.

"great evil", which he would tolerate "as long as it is necessary "but not a moment longer". His criticisms went so far as to say that there was no trade union in Canada with whose principles he agreed, and he denounced the union, or at any rate the control over it exercised by its executive, as "spurious" and a "fake".

Such an attitude, whatever its justification, was not calculated to make him generally acceptable to the union and its officers, and in February, 1945, after much previous controversy and some abortive litigation, three charges were made against him in writing by a member of the union of offences committed in breach of art. 26 of the byelaws of the union, as follows: (1.) he assisted in holding an unauthorized public meeting to discuss internal business of the union; (2.) between October, 1942, and December, 1944, he was guilty of conduct unbecoming of a member of the union and committed acts discreditable to it in publicly opposing established policies of the union by campaigning against the closed-shop principle; and (3.) he violated the oath of obligation of a member of the union in failing to repudiate certain radio broadcasts made in his behalf, which contained statements slanderous of one Stewart, a member and then president of the union. Each of these offences was included in the list of "serious "offences" under group B of the article.

Article 26 went on to provide that, on such a charge being laid and read out to a general business meeting of the union, it should be handed to the press and investigating committee "to "conduct the trial". The respondent was duly notified of the charges and of the date and place of hearing, as the byelaw required. He attended the proceedings, giving evidence and being cross-examined. He alleged that he wished other members named McPheator and Mole to attend as witnesses, but this was refused him by the committee: it turned out, however, that he wished for their presence only as observers and he did not intend to call them to testify.

The byelaw prescribes that the committee at the end of the hearing is to take a vote "to determine the guilt or innocence "of the accused" and to prepare a concise report for the next regular general meeting of the union. This was done: the report was unanimous and found the respondent guilty on all three charges. Under the byelaw the steps then to be taken are as follows:—

"(10.) After the report is read out at a general membership "meeting, the motion shall be put to accept or reject the com"mittee's report and there shall be no debate or review of the

" case by the meeting; but the meeting shall first hear the views " of the minority of the trial committee, if any, and shall permit " one each, of the complainant's and accused's witnesses, to " plead for, or state their side, and shall permit statements to be " made by the complainant and the defendant, or by their " counsels, and by the union's counsel if one has been appointed; " and all the said persons shall be given the right of the floor for " an equal and predetermined period.

" (11.) The meeting shall then vote on the motion by show-of- " hands, standing or secret ballot, and if the charges are sustained " by a majority of the members voting, the accused stands con- " victed and the meeting shall fix the penalty, also by majority " vote; but concurrence of a two-thirds majority present and " voting shall be required to expel a member. If the charges " are not sustained, the defendant shall automatically be declared " exonerated of the alleged offence ".

Then follows a provision headed " Appeals ":—

" If a member has been found guilty by a general business " meeting of any offence under group B of this article and feels " that the decision is unfair, or the penalty too severe, he may, " within sixty days, file an appeal in writing with the executive " of the Shipyard General Workers' Federation; but no appeal " shall be permitted from the imposition of a fine, or in cases " where a fine was part of some other penalty, unless such fine " is first paid. If expulsion has been the penalty, an appeal shall " stay the order, until decision by the appellate tribunal, but " shall not restore the accused to regular membership and his " status shall be that of a charged member, as specified in " group B, s. (5.) of this article ".

Article 22 of the byelaws provided in paras. (5.) and (6.) that a person who remained a member of the union after the byelaws came into force (as was the case with the respondent) should be deemed to have entered into a contract with the union and with every other member therein, whereby in consideration of the benefits bestowed by such membership, such person undertakes to accept, indorse, and at all times abide by the terms of the oath of obligation set forth in para. (7.). The part of the oath of obligation which is immediately relevant in the present case runs as follows:—

" I promise that I will not become a party to any suit at law " or in equity against this union or the federation, until I have " exhausted all remedies allowed to me by said constitution and " byelaws ". It is a crucial circumstance in the present litigation that it was instituted by the respondent without first appealing to the federation from the findings against him in the report and the resolution of expulsion subsequently adopted at the general business meeting.

The general business meeting (called in para. (10.) of the byelaw the general membership meeting) before which the report came was held on March 19, 1945, the chair being taken by the appellant Nuttall. Stewart put the case for the report and the respondent, not without considerable interruption, opposed. Then, before the vote was taken, Nuttall spoke for a few minutes, strongly denouncing the respondent as a friend of the capitalist class—an intervention not in any way justified by the byelaw. On a show of hands a resolution expelling the respondent from the union was passed by 454 to twelve. A member named Jenkins was observed to be taking down the names of those who voted in the minority, and this is relied on by the respondent as confirming his allegation that the vote was influenced by intimidation. Moreover, the trial judge accepted the evidence of McPheator, (1.) that the appellant Clark, who afterwards acted on the committee which tried the respondent, told him that the respondent would be " crucified " by the committee—this, however, as the respondent's counsel admitted, was before Clark was elected to the committee—and (2.) that the appellant White warned McPheator to " lay off " talking to the respondent " or " what they contemplated doing to him would also happen to " me ". Whittaker, J., also accepted the evidence of Mole that Clark had used threatening language to him if he continued to follow and back up the respondent. The evidence as to these threats seems to indicate that White and Clark were speaking in reference to an impending election of union officers (when the respondent stood unsuccessfully for the presidency) which took place in December, 1944.

Whatever the correct details may be, their Lordships are bound to conclude that there was, before and after the trial, strong and widespread resentment felt against the respondent by many in the union and that Clark, amongst others, formed and expressed adverse views about him. If the so-called " trial " and the general meeting which followed had to be conducted by persons previously free from all bias and prejudice, this condition was certainly not fulfilled. It would, indeed, be an error to demand from those who took part the strict impartiality of mind with which a judge should approach and decide an issue between two litigants—that " icy impartiality of a Rhadamanthus " which

Bowen, L.J., in *Jackson* v. *Barry Railway Co.* (27), thought could not be expected of the engineer-arbitrator—or to regard as disqualified from acting any member who had held and expressed the view that the " closed-shop " principle was essential to the policy and purpose of the union. What those who considered the charges against the respondent and decided whether he was guilty ought to bring to their task was a will to reach an honest conclusion after hearing what was urged on either side, and a resolve not to make up their minds beforehand on his personal guilt, however firmly they held their conviction as to union policy and however strongly they had shared in previous adverse criticism of the respondent's conduct.

The question of the extent to which those who took part in the so-called trial, and in the general meeting which considered the report, were actuated or influenced, not only by preconceived views, but by a resolve to condemn the respondent, is a question of fact to be deduced or inferred from the evidence. Whittaker, J., concluded that " it cannot by any stretch of the " imagination be said that the trial within the union was one " that was free from prejudice and bias ". And after referring to the evidence of McPheator and Mole, and to an article written by the secretary of the union in its official organ on February 2, 1945, which strongly denounced the respondent's previous conduct and said that if he " intends to take us to court again, he " will be placing the entire trade union movement on trial as to " whether a trade union has the right to discipline its members " for violation of union policies and individual member's obliga- " tions ", the judge added, " it is almost inconceivable that so " determined an effort should have been made to influence the " members against the plaintiff while the charges were pending " and before the plaintiff had been tried. . . . In the light of the " facts detailed above, I am of the opinion that the purported " expulsion of the plaintiff was contrary to natural justice ".

In the Court of Appeal, O'Halloran, J.A., went even further, holding that the leaders of the union had no justification for the conclusion that the respondent was an enemy of organized labour and that the trial committee " was inexorably biased against the " respondent ". He went on: " In such circumstances it was " obviously impossible for the respondent to receive a fair trial " on the merits. Once it was proven he was against the closed- " shop policy and in favour of the open-shop policy (as he readily

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(27) [1893] 1 Ch. 238, 248.

"conceded he was), it was obvious the verdict would be for his "expulsion from the union. There could be in that trial committee as constituted no opportunity for judicial consideration "of the question on its merits. The verdict for expulsion was "inevitably prejudiced and virtually decided before the trial was "held. In essence, there was no trial at all. The trial committee was simply carrying out the declared policy of the union "as announced by its leaders at the time".

This judge, after dwelling on the gravity of a sentence of expulsion, in view of its effect in limiting or destroying the respondent's prospects of obtaining work elsewhere, went on to lay it down that "a man has a right to work at his trade. If membership in a union is a condition attached to working at his trade, "then he has an indefeasible right to belong to that union. It "must be so, or else the union can have no right to agitate for "a closed shop. . . . Moreover, the civil liberties of the subject "cannot be decided by a trial committee set up by a labour "union. That is the prerogative of the constituted courts of "the country. In my judgment, the question the union trial "committee sought to deal with in the circumstances here was "beyond the competence of any union to decide".

Their Lordships, while fully alive to the considerations which weighed with this judge, must not be understood to agree with these last observations, which form no part of the argument used by the other judges who considered the case, and which are not necessary to support the view which has hitherto prevailed in this litigation. Moreover, it is right to observe that the defence that the union was an illegal association, having objects which are in restraint of trade, was pleaded in the amended statement of defence, but at the trial Whittaker, J., held that the defence of illegality was not sufficiently raised and, in any case, was not established. This finding was not challenged on appeal and is not really in issue before their Lordships.

Robertson, J.A., agreed with the trial judge that the purported expulsion was contrary to natural justice, and further held that the committee was not competent to hear the charges and that Clark, a member of the committee, was so biased against the respondent as to render him unfit to act.

Sidney Smith, J.A., thought that the phrase "natural "justice" had little meaning and that it might be misleading. He quoted the words of Lord Sumner, when sitting in the Court of Appeal as Hamilton, L.J., in *Rex* v. *Local Government*

Board (28), that the phrase was an expression "sadly lacking in "precision". (This case went to the Lords (29).) But, while accepting and applying the view of Maugham, J., in *Maclean* v. *Workers' Union* (30), that the conduct of a person charged might well be such that every other member of the union might have a strong animus against him, and agreeing that the court should not interfere merely because the committee and the general executive detested him, the judge went on to say, "But "the plaintiff's actions by no means justified the conduct that "some of the committee and some of the main executive had "been guilty of. No resentment, however just, can excuse it". And, after reviewing the evidence, he concluded that the expulsion was invalid and bad in law.

The two judges who were in the minority in the Court of Appeal, the Chief Justice and Bird, J.A., do not express any dissent from the adverse view on the merits taken by their colleagues, and their Lordships will deal with the matter on the basis that severe condemnation of the methods followed in the proceedings under review is fully justified. If these were the only relevant considerations, some difficult questions would arise. For example, is the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, appealable, or, on the contrary, is it simply void and thus not subject to appeal at all? And the further question would then have to be considered, namely, how far the law on the subject of bias or prejudice or failure to apply natural justice extends to such a tribunal as the trial committee and the general meeting which is considering the committee's report.

The answers to these questions would not, however, be decisive of the present case, if the view taken by the two judges who were in the minority of the Court of Appeal prevails. The respondent, after his condemnation by the general meeting, did not appeal to the Shipyard General Workers' Federation before invoking the court's jurisdiction, although he was contractually bound not to institute any action against the union until he had exhausted all the remedies allowed by the union's constitution and byelaws. The Chief Justice and Bird, J.A., took the view that on this ground the respondent's claim must fail. This issue has been elaborately and excellently argued before their Lordships by counsel on either side, and it remains to examine the contention.

(28) [1914] 1 K. B. 160, 199.
(29) [1915] A. C. 120.
(30) [1929] 1 Ch. 602.

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The respondent sets up two answers to it. (a) He contends that the trial committee was not properly constituted. If this is proved to be so, any proceedings for hearing and deciding on the charges were a nullity; the general meeting had no valid report before them; the sentence of expulsion would be without authority under the byelaws; and there would be no basis for an appeal to the federation. (b) Even if the committee was properly constituted, he contends that the conclusion reached at the general meeting should not be regarded as a " decision " on the ground that it was arrived at by methods which make it contrary to natural justice and that it is the result of bias and even intimidation.

The respondent relied on expressions in some English cases which would suggest that a conclusion reached by certain tribunals in such circumstances may depart so far from a judicial pronouncement as not to amount to a " decision " at all. However this may be, a crucial question under this second head is whether the conclusion reached by the general committee was a " decision " within the meaning of that word in the provision headed " Appeals " above quoted.

On both of these points there is a difference of opinion among the British Columbian judges. As to (a) Whittaker, J., held that the committee was not properly constituted, inasmuch as when one of the six declared to have been elected to it was found not to be qualified, the vacancy was not filled by the election of one new member, but the five who had been duly elected resigned and were renominated together with a substituted candidate, while the rest of the candidates originally nominated but not elected were treated as no longer standing. Thus the six who acted as the committee had an unopposed return. In the Court of Appeal O'Halloran, J.A., did not pronounce on the point; Robertson, J.A., assumed that the second election produced a validly constituted committee; Sidney Smith, J.A., was by no means satisfied that there was anything irregular in the method chosen for filling the vacancy; while Bird, J.A., with whom the Chief Justice agreed, considered that the method adopted was " a bona fide attempt to resolve the difficulty consequent upon " the discovery of the disqualification of one member " and that the solution as a whole " constituted a reasonable and practical " compliance with the spirit of the byelaws ". The secretary to the committee was chosen by its members out of their own body, whereas byelaw 18 directed that he should be " the most " successful candidate ", but this adaptation was necessitated by the fact that all the members were elected without a ballot. Their Lordships, after receiving argument on issue (a) from both sides, intimated at the hearing that in their view the trial committee must be regarded as validly constituted.

As to (b), the whole difficulty is to put the proper construction on the word " decision " when the byelaw gives a right of appeal from the general meeting to the federation if a member found guilty or penalized by the former " feels that the decision is " unfair or the penalty too severe ". The view of the Chief Justice and Bird, J.A., is that the conclusion reached by the general meeting was a " decision " within the meaning of that expression in the byelaws even though it was tainted by bias or prejudice, or arrived at in defiance of natural justice, and even though the voting of some members may have been affected by intimidation. According to this view, these circumstances, or the allegation of them, would be matter for the consideration of the appellate tribunal, and would not justify the contention that no appeal was possible because there was no " decision " to appeal against.

After anxious reflection, their Lordships have reached the conclusion that this is the correct view. The meaning of " decision " in byelaw 26 must be arrived at by examining the byelaws as a whole. The scheme of them manifestly is that members of the union design to settle disputes between a member and the union in the domestic forum to the exclusion of the law courts, at any rate until the remedies provided by the constitution and byelaws, including the opportunity for appeal to the federation, are fully exhausted. If the question had been asked of the respondent, or of any of his fellow-members, " What was the decision of the " general committee? " it cannot be doubted that the answer would have been, not that no decision had been given, but that the decision was to condemn and expel the respondent. And this would be so, not only because it is the natural reply for members of the union to give in the circumstances, but because it would be the right answer. " Decision " in the byelaw means " conclusion ". The refinement which lawyers may appreciate between a tribunal's " decision " and a conclusion pronounced by a tribunal which, though within the tribunal's jurisdiction, may be treated, because of the improper way in which it was reached, as no decision at all and therefore incapable of being subject to appeal, cannot be attributed to the draftsman of these byelaws or to the trade-unionists who adopted them as their domestic code.

Their Lordships are therefore constrained to hold that the conclusion reached by the general committee was subject to appeal. And they must respectfully repudiate both the correctness and the relevance of the view that it would have been useless for the respondent to appeal because the federation would be sure to decide against him. They see no reason why the federation, if called on to deal with the appeal, should be assumed to be incapable of giving its honest attention to a complaint of unfairness or of undue severity, and of endeavouring to arrive at the right final decision. At any rate, this is the appeal which the respondent was bound by his contract to pursue before he could issue his writ. He has not done so, and on this ground their Lordships will humbly advise His Majesty that the appeal must be allowed.

The respondent must bear the costs of the appeal to this Board and of the appeal to the Court of Appeal in British Columbia, but each party should bear its own costs of the trial where the point on which the appellants now succeed was not originally raised.

Solicitors: *Gard, Lyell & Co.; White & Leonard.*

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NANCE . . . . APPELLANT;
AND
BRITISH COLUMBIA ELECTRIC RAILWAY
COMPANY LD. . . . . RESPONDENT.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Motor vehicle—Running-down accident to pedestrian—Plea of contributory negligence—Whether duty owed by injured party to party sued—Duty to act carefully—Death of injured party—Damages—Quantum.

At the trial before a special jury of an action for damages brought by the appellant against the respondent company in respect of the death of her husband, who was run into by a street-car and killed instantly, the trial judge directed the jury that before they could find that the deceased had been guilty of contributory negligence, as was alleged, they must find that he owed a duty to the respondent, and that he committed a breach of that duty and was therefore negligent. The jury negatived contributory negligence and found the respondent company solely to blame.

**Present*: VISCOUNT SIMON, LORD PORTER, LORD MORTON OF HENRYTON, LORD REID and LORD ASQUITH OF BISHOPSTONE.

Held, that there had been misdirection.

When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself, and contributed, by that want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. When a man steps from the kerb into the roadway he owes a duty to traffic which is approaching him with risk of collision to exercise due care.

Dictum of Denning, L.J., in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.*, [1949] 2 K. B. 291, 324, that "when a man "steps into the road he owes a duty to himself to take care "for his own safety, but he does not owe any duty to a motorist "who is going at an excessive speed to avoid being run down", if it is to be interpreted in a contrary sense, disapproved.

In the light of the summing-up as a whole, however, the misdirection in the present case could not be regarded as vitiating the conclusion of the jury, and their verdict that the respondent was alone to blame should stand.

A plea that a plaintiff was guilty of contributory negligence should be treated as setting up want of care by the plaintiff for his own safety, whether in the circumstances of the accident the plaintiff owed a duty to the defendant or not.

Observations on the factors to be taken into account in assessing the quantum of damages.

Judgment of the Court of Appeal for British Columbia varied.

APPEAL and CROSS-APPEAL (No. 26 of 1950) from a judgment of the Court of Appeal for British Columbia (February 23, 1950) allowing in part an appeal from a judgment of Whittaker, J., (June 24, 1949) on the trial of an action before a special jury, in

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which the appellant claimed damages in respect of the death of her husband on January 18, 1949, through being knocked down and instantly killed by a street-car driven by a motorman employed by the respondent company.

The following statement of the facts is taken from the judgment of the Judicial Committee: The appellant brought the action out of which this appeal arose under the Families Compensation Act (R. S. of B. C. 1948, c. 116) on her own behalf and on behalf of the children and step-children of the deceased, and alleged that her husband's death was caused by the negligence of the motorman, for which the respondent company was responsible. The jury so found, awarding damages of $35,000, and in the subsequent proceedings the company's liability for negligence was admitted. The company, however, had pleaded in its defence that the negligence of the deceased was a contributory cause of his death. The Contributory Negligence Act of British Columbia (R. S. 1936, c. 52) provides that where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault, provided that if it is not possible to establish different degrees of fault, the liability shall be apportioned equally. Consequently, if the company made good its allegation of the deceased's contributory negligence, it would be liable for only a portion of the damages awarded.

The accident occurred between 11 p.m. and midnight near the intersection of Kingsway, a main thoroughfare of Vancouver running approximately east and west, and Gladstone Street, which ran approximately north and south. Along Kingsway a double pair of rails was laid to carry the respondent company's street-cars. Kingsway was 55 ft. wide between the kerbs, and the roadway of Gladstone Street was about 30 ft. across. There was deep snow on the ground, but snow-ploughs had cleared the snow along the middle of Kingsway up to 8 ft. of the kerb on either side, thus leaving a central band of swept surface occupied by the rails and the " devil strip " between them (in all 15 ft.), and also a selvage of a further 12 ft. on either side of the rails. The whole of the swept surface was slippery from ice, and the piled snow between that surface and the kerbs, though at a higher level, was somewhat trampled down where foot-passengers had previously crossed. The whole area was well lighted. There were no traffic lights to regulate the crossing of foot-passengers or vehicles at the intersection.

The appellant and her husband began to cross Kingsway from the north-east corner of the intersection, being on his left and holding his left arm. He was a very tall and heavy man, and somewhat lame. The pair could only proceed across the road at a " slow shuffle ", with some slipping on the snowy and icy surface. It was in dispute whether they were crossing at right-angles or were inclining their course slightly to their left.

The street-car pulled up on reaching the intersection to take on four passengers, who could be seen to be waiting near the south-west corner to board it. The appellant and her husband had already gone some way in crossing the road and were continuing to do so, when the motorman, without warning, restarted the car and it advanced rapidly towards them, knocking the deceased down, just before he got clear of the southernmost rail, with such violence that his body projected his wife forward clear of the track, and she also was injured. The distance travelled by the car after restarting, before it collided with the deceased, appeared to have been no more than some 75 ft., and the car, which was 44 ft. long, then pulled up within two lengths. The car was of a new type, which could very quickly pick up a high speed amounting to 30 miles an hour. The motorman was the only employee on that type of car and consequently had to take fares and supply tickets, as well as to drive the car. There was evidence that, at the time of restarting, he was giving a ticket to one of the passengers, and he admitted that he never saw the injured couple at all, although they would have been clearly within his vision if he had looked.

The jury answered in the negative the question whether the deceased was guilty of negligence which contributed to the accident. Judgment was therefore entered for the appellant for the full amount of $35,000. The company appealed to the Court of Appeal on the ground that the finding of the jury that the deceased was not guilty of contributory negligence was unreasonable and perverse and against the evidence, and further contended that a passage in the summing up of Whittaker, J., concerning that issue was wrong in law and that the jury would not have found as they did if, in that matter, they had been properly directed.

The passage in the judge's charge which was complained of was as follows: " Before you can find that Nance was guilty of " contributory negligence, you must find that he owed a duty to " the defendant, and that he committed a breach of that duty, " and was, therefore, negligent ".

The three members of the British Columbian Court of Appeal (Sloan, C.J., O'Halloran and Sidney Smith, JJ.A.) were unanimous, for different reasons, in holding that the award of $35,000 could not stand. The Chief Justice was for reducing it to $20,000 (subject to a further reduction to $12,000 in respect of contributory negligence which he found proved); Sidney Smith, J.A., who did not find contributory negligence proved would have awarded $12,000; and O'Halloran, J.A., would have left the figure to be determined at a new trial on materials more adequate than those available at the actual trial. Both parties appealed.

1951. April 17, 18, 19, 20 and 23. *David A. Sturdy* (of the Canadian Bar) for the appellant. There was no misdirection. The trial judge correctly stated the law as to the duty of the deceased in the circumstances of the present case. He discussed the statement of defence, which alleged contributory negligence, the defence as disclosed in the course of the trial, and, exhaustively, all the individual conditions which existed at the time. [In connexion with the charge to the jury reference was made to *Swadling* v. *Cooper* (1), *Jones* v. *Canadian Pacific Ry.* (2), *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (3), *Swartz* v. *Wills* (4), *Scott* v. *Fernie* (5), and *Victoria Corporation* v. *Patterson* (6).] Further, it is submitted that the company was not entitled to raise the question of misdirection before the Court of Appeal for British Columbia or before this Board in view of the statement of their counsel—in reply to Whittaker, J.'s question at the close of his summing-up whether there was " any objection " to the charge or anything counsel would like me to add "—that it was " entirely fair ": *British Columbia Electric Ry. Co.* v. *Key* (7).

It should be remembered that only the trial judge had the advantage of seeing and hearing the witnesses: *Powell* v. *Streatham Manor Nursing Home* (8). The only eye-witness stated that the appellant and the deceased were within the two tracks which constituted the course of the street-car at the moment when it started up from the corner of the intersection. A witness for the respondent estimated the speed of the street-car at about 20 to 30 miles an hour, which gave the deceased

(1) [1931] A. C. 1, 8.
(2) (1913) 83 L. J. (P. C.) 13, 19.
(3) [1940] A. C. 152, 182.
(4) [1935] S. C. R. (Can.) 628, 634.
(5) (1904) 11 B. C. 91, 96.
(6) [1899] A. C. 615.
(7) [1931] 3 D. L. R. 587.
(8) [1935] A. C. 243, 257.

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approximately two seconds in which to escape. On the whole of the evidence, it is submitted, there is an overwhelming case for the motorman being solely responsible for the accident. In the weather conditions prevailing at the time, and in the absence of any direct evidence against the deceased, it is further submitted that the deceased could not be said to have been negligent at all.

As to damages, no majority judgment of the court appealed from as to the quantum of damages has been substituted for the quantum found by the jury, and the judgment of the court appealed from is the arithmetical result of opinions mutually inconsistent. The principles to be applied in assessing the damages are those laid down in *Davies* v. *Powell Duffryn Associated Collieries Ld.* (9), where Lord Porter said that " the finding of " the trial judge as to the amount of damages will not be " reviewed unless the appellate court is satisfied that the trial " judge acted on a wrong principle of law or the amount of " damages is such as to make it an entirely erroneous estimate " of the damages to which the claimants were entitled "; and Lord Wright said that " an appellate court . . . is particularly " reluctant to interfere with a finding on damages which differs " from an ordinary finding of fact in that it is generally much " more a matter of speculation and estimate ". Here, it was entirely within the province of the jury to fix the sum they arrived at—they were fully aware of all the relevant facts in that connexion—and the Board should restore their verdict.

J. W. de B. Farris, K.C., and *A. B. Robertson, K.C.* (both of the Canadian Bar) for the respondent company. The only questions now in dispute are the contributory negligence of the deceased and the amount of damages. The respondent did not contend, and does not now contend, that its employee was not guilty of negligence. To the extent that a party is the author of his own injury the damage or loss must be apportioned to that extent under the Contributory Negligence Act of British Columbia, R.S. 1936, c. 52. It is submitted that the trial judge misdirected the jury in his charge when he said that " before " you can find that Nance was guilty of contributory negligence, " you must find that he owed a duty to the defendant and that " he committed a breach of that duty, and was, therefore, " negligent ". That is not the law: *Davies* v. *Swan Motor Co. (Swansea) Ld.* (10). If there was some theoretical duty owed to the company if it was taking care, it is hard to appreciate that in law there was a duty to the motorman who was not taking care, and it would be almost impossible to persuade a jury to that effect. The whole case for the company is based on the consideration that, whether there was a duty or not, a man for the sake of his own preservation owes a duty to take care of himself, and that to that extent, if he is the author of his own wrong, he must suffer the consequences.

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(9) [1942] A. C. 601, 624, 616.

(10) [1949] 2 K. B. 291.

If counsel agree on the questions to be left to the jury by the judge then they cannot complain, but the position would be otherwise where there had been a general direction. Here what the company's counsel said at the close of the summing-up—that it was " entirely fair "—did not divert the judge from what his intention was. In the case of alleged misdirection the first consideration is, does the statement complained of standing alone constitute material misdirection? The passage in question here does so. Secondly, is it established that the charge as a whole corrects the misdirection, so that it can be said with reasonable certainty that the jury were not misled, and that in consequence the misdirection did not affect their verdict? This is not a case of an inadvertent misdirection; it was an intentional statement of what the judge believed to be the law. In the charge as a whole he did not correct the misdirection.

On the next branch of the case it is sought to support the judgment of the Chief Justice of British Columbia where he said, in discussing the question of contributory negligence, " in my " evaluation of the evidence the deceased was at fault in not " keeping a proper lookout for an approaching street-car, fully " lighted and clearly visible. Had he taken the necessary pre- " caution of a momentary glance, he would not have walked into " a position of imminent peril or at least quickened his pace to " step clear of the tracks. He had the advantage of mobility, " whereas the street-car was bound by its rails to an undeviating " course ". There was a perverse verdict here. Admittedly the company must establish that the weight of the evidence is so strong in their favour that no reasonable jury, appreciating all the facts and inferences, could reasonably come to the decision which they did. Both parties were to blame; the evidence and the implications are overwhelmingly in support of the plea of contributory negligence.

Robertson, K.C., following on the question of damages. Thirty-five thousand dollars is excessive in this case: it is out of all proportion to the circumstances: *Davies* v. *Powell Duffryn*

Associated Collieries Ld. (11); *Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.* (12). Other authorities which lay down the principles which govern the matter are *Grand Trunk Ry. Co. of Canada* v. *Jennings* (13); *Royal Trust Co.* v. *Canadian Pacific Ry. Co.* (14); *Deutch* v. *Martin* (15); *Johnston* v. *Great Western Ry. Co.* (16); and *Rowley* v. *London and North Western Ry. Co.* (17). [Counsel then discussed the particular materials relevant to the question of damages—the deceased's expectation of life and the expectancy of productive working years; his financial prospects; and the loss suffered and the benefit gained by his wife and children as a result of his death.] Taking all the circumstances into consideration, if the jury had fixed a figure of $10,000 nobody would have complained or thought that there had been an injustice. The verdict was out of all proportion in the circumstances.

Sturdy in reply. In all the circumstances and applying all the appropriate tests, this was a proper award by the jury and was not excessive: *Deutch* v. *Martin* (15); *Royal Trust Co.* v. *Canadian Pacific Ry. Co.* (14). For how far income tax may be taken into consideration in this connexion, see *Billingham* v. *Hughes* (18).

June 20. The judgment of their Lordships was delivered by Viscount Simon, who stated the facts set out above and continued:—In these circumstances, the jury had to consider whether the deceased was guilty of contributory negligence. As he was instantly killed, he could not personally testify, but the appellant said that she had seen the street-car some 250 ft. away and realized that the car would stop on reaching the intersection, as it did. It appears to their Lordships that a properly instructed jury might without perversity come to the conclusion, on the evidence available, that the respondent company had not discharged the burden of proving contributory negligence on the part of the deceased. If the deceased, after starting to cross, looked to see the position of the street-car and noted that it had come to a stop for taking on passengers, he might reasonably have continued to cross the road, assuming that the car would not

(11) [1942] A. C. 601, 616.
(12) [1935] A. C. 346.
(13) (1888) 13 App. Cas. 800, 803–4.
(14) (1922) 3 W. W. R. 24.
(15) [1943] S. C. R. (Can.) 366, 369.
(16) [1904] 2 K. B. 250.
(17) (1873) L. R. 8 Ex. 221.
(18) [1949] 1 K. B. 643, 655.

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start up again and advance towards him at a high rate of speed until he and his wife were safely beyond the rails. Even though there was some justification for taking the contrary view, it was for the jury to decide whether they were satisfied that the respondent company had proved their plea. Their Lordships consider that there would be no ground for reversing the jury's finding on this point, or for ordering a new trial, unless the summing-up misled the jury.

As to this, the passage in the judge's charge which is complained of was as follows:— " Before you can find that Nance was " guilty of contributory negligence, you must find that he owed a " duty to the defendant, and that he committed a breach of that " duty, and was, therefore, negligent. The onus of proving con- " tributory negligence is upon the defendant, and that must be " proved by a preponderance of evidence, which you are prepared " to accept ".

The three judges of the Court of Appeal were unanimously of the view that the judgment below could not stand, but for widely different reasons. Sloan, C.J., held that the passage just quoted from the summing-up was a misleading and inaccurate exposition of the obligations of the deceased. In his view, the deceased owed no " duty " to the respondent company, but was subject to an imperative obligation to exercise reasonable care for his own safety. As the jury was not so instructed, the Chief Justice held that there was misdirection, which had occasioned a miscarriage of justice, and that the verdict of the jury and the judgment entered thereon must be set aside. The Chief Justice then substituted the judgment which he considered ought to have been given, namely, that the deceased was at fault in not keeping a proper outlook for the approaching street-car; he said " Had he taken the precaution of a momentary glance, he would " not have walked into a position of imminent peril ". (On this, their Lordships would respectfully observe that in their opinion there was no evidence that the deceased did not look, and that if he looked, it may be that he saw that the car was stationary. A person crossing the road in such circumstances cannot reasonably be expected to " keep his eye " continuously on the car, for he has to look after his own steps on the slippery surface, and the Chief Justice only postulates a " momentary glance ".) As for damages, the Chief Justice's view was that the damages awarded by the jury were excessive and that $20,000 would fairly represent the pecuniary loss suffered by Mrs. Nance and those she represents. He fixed the degree of fault of the motorman at 60 per cent. and that of the deceased at 40 per cent., with the result that judgment should be entered for $12,000.

O'Halloran, J.A., on the contrary, took the view that "the jury "would have failed to act judicially if they had not reached "the decision that the motorman was solely responsible for the "collision". The judge met the criticism directed to Whittaker, J.'s summing-up by examining the pleadings, which he considered set up the breach of duty owed by the deceased to the respondent company as the only contributory negligence alleged and did not include an allegation of his carelessness apart from duty. In his view Whittaker, J.'s charge was entirely correct. He added, "the argument that in crossing the street "the deceased owed no duty to the street-car to be careful is "one which I have struggled unsuccessfully to appreciate". In the result, O'Halloran, J.A., while holding the respondent company solely to blame, was of opinion that the $35,000 awarded as damages appeared to be "purely arbitrary and without foundation in the evidence" and was in favour of directing a new trial to decide the proper quantum.

Sidney Smith, J.A., also took the view that there was no contributory negligence by the deceased; "the assumption that the "deceased did not see the car at all is against the evidence . . . "but he was then so far advanced in the intersection that he was "entitled to assume the car would give way to him". This judge was not prepared to accept the view that a pedestrian crossing a street owes to approaching traffic the duty to be careful, for he said "a pedestrian carries no menace; and since a "pedestrian is practically incapable of causing damage to a "vehicle by a collision, only damage to him need be considered". Their Lordships, as will appear hereafter, must not be understood to agree with this proposition. The judge consequently held that there was clear misdirection, but at the same time held that the respondent company had disabled itself from taking the point, since at the end of the summing-up Whittaker, J., had inquired of counsel whether there was any objection to his charge and counsel then appearing for the respondent company had replied that it was "entirely fair". Their Lordships find themselves relieved from pronouncing on this view of the matter, which was apparently not shared by the other two judges of the Court of Appeal. Sidney Smith, J.A., however, considered that the award of damages was excessive and thought that a figure of more than $12,000 could not be justified.

With this conflict of judicial opinion before them their Lordships must now deal with the objection to the summing-up and consider whether the conclusion reached by the jury was affected by any mistake in it. The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.* (19), to which the Chief Justice referred.

This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, e.g., if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of Denning, L.J.'s judgment in the *Davies* case (20), where he says, " when a man steps into the road he owes a duty " to himself to take care for his own safety, but he does not owe " any duty to a motorist who is going at an excessive speed to " avoid being run down ", is to be interpreted in a contrary sense, their Lordships cannot agree with it.

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(19) [1949] 2 K. B. 291.

Their Lordships do not feel able to accept the view of O'Halloran, J.A., that the pleadings in this case debar the respondent company from objecting that the passage complained of in Whittaker, J.'s charge is wrong in law. The plea that the deceased was guilty of contributory negligence is wide enough to cover the contention that he was careless of his own safety, even though he did not owe a duty to the respondent company to be careful. It is perhaps unfortunate that the phrase " contributory " negligence " uses the word " negligence " in a sense somewhat different from that which the latter word would bear when negligence is the cause of action. It may be pointed out that in the Law Reform (Contributory Negligence) Act, 1945, of the United Kingdom Parliament (8 & 9 Geo. 6, c. 28) the contrast between the two meanings is recognized, for that Act, which provides for a sharing of responsibility for damage where a person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, defines " fault " as " negligence, " breach of statutory duty or other act or omission which gives " rise to a liability in tort or would, apart from this Act, give rise " to the defence of contributory negligence ". The Contributory Negligence Act of British Columbia, which was passed before the United Kingdom Act, does not contain a definition of " fault ", but there is no doubt that in British Columbia the conception of contributory negligence, which is part of the common law, is the same as in this country. Such a plea should be treated as setting up want of care by the plaintiff for his own safety, whether in the circumstances of the accident the plaintiff owed a duty to the defendant or not.

With the above considerations in mind, both as to the facts and as to the law, their Lordships have carefully considered whether the impugned passage in the summing-up of the trial judge should be regarded as vitiating the conclusion of the jury. To decide this question, it is necessary to have regard to the summing-up as a whole. The misdirection occurs early in the judge's charge and it is followed by a full and careful survey of the

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(20) [1949] 2 K. B. 291, 324.

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evidence, to which no objection can be taken and which placed the essential issues before the jury very clearly. Moreover, the question put at the end of the summing-up to the jury on contributory negligence is correctly framed and contains no suggestion that the defence would be incomplete unless " duty " is proved to the jury's satisfaction. Their Lordships have come to the conclusion, after weighing these various elements, that the error complained of did not mislead the jury and the verdict that the respondent company was solely to blame should stand.

Their Lordships now turn to the question of quantum of damages. As already stated, the jury awarded the plaintiff $35,000. The three members of the British Columbian Court of Appeal were unanimous, for different reasons, in holding that this figure could not stand. The Chief Justice was for reducing it to $20,000 (subject to a further reduction to $12,000 in respect of contributory negligence which he found proved); Sidney Smith, J.A., who did not find contributory negligence proved, would have awarded $12,000; and O'Halloran, J.A., would have left the figure to be determined at a new trial on materials more adequate than those available at the actual trial.

In those circumstances two distinct questions arise:— (1.) What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case. (2.) What principles should govern the assessment of the quantum of damages by the tribunal of first instance itself.

(1.) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint* v. *Lovell* (21), approved by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries, Ld.* (22)). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of "all proportion" (*per* Lord Wright, *Davies* v. *Powell Duffryn Associated Collieries, Ld.* (23)).

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(21) [1935] 1 K. B. 354.

(22) [1942] A. C. 601.

(2.) The second question is, what principles the court of first instance should itself apply in determining the quantum of damages under the relevant British Columbian legislation, which reproduces with inconspicuous differences the Fatal Accidents Acts in force in the United Kingdom. (Among these differences their Lordships note that while in the United Kingdom any sums for which the deceased has insured his life are not to be taken into account, in British Columbia a different rule prevails in this regard.)

The claim to damages in the present case falls under two separate heads. First, if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family? (Under this head in the present case the wife or widow need alone be considered, since his children and step-children were all adults and self supporting, and at the time of his death he contributed nothing material to their maintenance.) Secondly, in addition to any sum arrived at under the first head, the case has been argued on the assumption, common to both parties, that according to the law of British Columbia it would be proper to award a sum representing such portion of any additional savings which he would or might have accumulated during the period for which, but for his accident, he would have lived, as on his death at the end of this period would probably have accrued to his wife and family by devolution either on his intestacy or under his will, if he made a will.

A proper approach to these questions is, in their Lordships' view, one which takes into account and gives due weight to the following factors; the evaluation of some, indeed most, of them can, at best, be but roughly calculated.

Under the first head—indeed, for the purposes of both heads—

(23) [1942] A. C. 601, 616.

it is necessary first to estimate what was the deceased man's expectation of life if he had not been killed when he was; (let this be " x " years) and next what sums during these x years he would probably have applied to the support of his wife. In fixing x, regard must be had not only to his age and bodily health, but to the possibility of a premature determination of his life by a later accident. In estimating future provision for his wife, the amounts he usually applied in this way before his death are obviously relevant, and often the best evidence available; though not conclusive, since if he had survived, his means might have expanded or shrunk, and his liberality might have grown or wilted. In the present case it is known that in the years 1945–48, which immediately preceded his death, his " drawings " from his business averaged $2,600 per annum. His wife's maintenance was derived from, and could not have exceeded, these drawings. What proportion of such amount he in fact contributed to her support is a matter of guess-work, but both his widow and her sister give him a good character for generosity. He was a " good " provider ". Supposing, by this method, an estimated annual sum of $\$y$ is arrived at as the sum which would have been applied for the benefit of the plaintiff for x more years, the sum to be awarded is not simply $\$y$ multiplied by x, because that sum is a sum spread over a period of years and must be discounted so as to arrive at its equivalent in the form of a lump sum payable at his death as damages. Then a deduction must further be made for the benefit accruing to the widow from the acceleration of her interest in his estate on his death intestate in 1949 (she came into $6,500, one-third of his estate, x years sooner than she would otherwise have done) and of her interest in sums payable on a policy of $1,000 on his life; and a further allowance must be made for a possibility which might have been realized if he had not been killed but had embarked on his allotted span of x years, namely, the possibility that the wife might have died before he did. And there is a further possibility to be allowed for—though in most cases it is incapable of evaluation—namely, the possibility that, in the events which have actually happened, the widow might remarry, in circumstances which would improve her financial position.

A figure having been arrived at under this first head, there should be added to it a figure arrived at under the second head. The question there is what additional amount he would probably have saved during the x years if he had so long endured, and what part, if any, of these additional savings his family would have been likely to inherit.

Here it is to be noted that under the law of Alberta (which is the relevant law) he would have been free to leave his whole estate away from his family. There is in that Province apparently no "legitima portio" or "querela inofficiosi testamenti". However, he had made no will when he died at the age of nearly fifty-four, and it seems reasonable to assume that if he had lived on he would either have died intestate, in which case his widow and his own two children would have taken his whole estate in equal thirds; or that if he had made a will, these three persons would in some proportions (it matters not for the present purpose what proportions) have been the sole objects of his testamentary bounty.

The main question here is:—if he had continued to live for *x* years what annual sum during this period would he probably have accumulated in the form of savings? The appellant's counsel invited their Lordships to say that he would have saved an average sum of $3,000 a year. This figure, subject to a number of discounts, was based on the evidence that between 1945–48 his earnings had risen in a sharp curve as follows:

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1945	1,469.57
1946	4,707.30
1947	7,689.40
1948	9,638.30

and that they would have been likely, if not to increase, to remain somewhere near this peak level. His accountant estimated that his *gross* earnings might have continued at a rate of about $6,000–$7,000 a year.

Their Lordships consider this estimate very questionable. The period 1945–48 was abnormal. Before it started the deceased had in all his working life saved only about $4,000. He had enjoyed, and then lost, an agency in a limited area for the sale of agricultural implements supplied by International Harvester Inc. He recovered this agency in December, 1945, and it was the main staple of his income till 1949: but he might have lost it again. The garage business which he also ran was a subsidiary and quite minor source of revenue. The period of steeply mounting profits was one in which there was a banked-up unsatisfied demand for agricultural implements, carrying with it as a corollary a strong sellers' market and boom conditions. This state of affairs could not have been expected to continue

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indefinitely. His so-called savings in the pre-war years were mostly sums ploughed back into the business. The business itself depended on the world supply and demand for wheat, which is subject to considerable fluctuation. It cannot be assumed that he would in no part of the x years have made a loss or have been affected by fluctuations in the world price of wheat, or that a third world war might not have diverted production from ploughshares to swords and dried up his main source of profit.

Whatever sum he would have saved over x years must again be reduced to its lump sum equivalent here and now, and further discounted to allow for the contingency that his wife might have died before him; though these reducing factors would have been to some extent offset by any interest carried by the savings annually set aside.

Taking all these considerations into account, and basing on them the best estimate they can form, their Lordships are satisfied that a jury could not reasonably have computed the total recoverable damage at a figure exceeding $22,500. This figure in their view falls short of the $35,000 award by a margin wide enough to justify the British Columbian Court of Appeal in rejecting the jury's figure. In that case a new trial on damages could be ordered, but the parties through their counsel have expressed their preference for the determination of the figure for damages on the advice of this Board. Their Lordships accordingly will humbly advise his Majesty that the appeal should be allowed, and the sum of $12,000 awarded as damages by the Court of Appeal should be increased to $22,500. The cross-appeal should be dismissed. The respondent must pay the appellant's costs throughout.

Solicitors: *Gard, Lyell & Co.; Linklaters & Paines.*

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1951
June 27

ABOUL RACHANAN TAMIM AND ANOTHER . APPELLANTS;

AND

COMPTROLLER OF CUSTOMS . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

Customs (West Africa (Gold Coast))—Prohibited goods brought to premises for purpose of being exported—Intention to export abandoned—Liability—Jurisdiction to try suit without pleadings—Import, Export and Customs Powers (Defence) Ordinance, No. 29 *of* 1939, *s.* 5, *sub-s.* 1 (*b*)—*Export (Restriction) Order, No.* 35 *of* 1940, *s.* 1—*Customs Ordinance (Gold Coast,* 1936 *Rev., c.* 132), *s.* 145, *sub-ss.* 1, 3—*Courts Ordinance (Gold Coast,* 1936 *Rev., c.* 4), *Sched.* 3, *Ord.* 25, *r.* 1.

Where the respondent instituted proceedings by writ of summons against the appellants claiming forfeiture of goods alleged to have been brought by them to certain premises for the purpose of being exported without the necessary licence, the magistrate had jurisdiction to try the suit on the writ of summons without pleadings, and there was nothing in s. 145, sub-ss. 1 and 3, of the Customs Ordinance of the Gold Coast which made it irregular for him to do so.

A person is liable to the penalty prescribed by s. 5, sub-s. 1 (*b*), of the Import, Export and Customs Powers (Defence) Ordinance, 1939, and to forfeiture of the goods if he takes part in bringing prohibited goods to a place for the purpose of export even if before seizure of the goods he abandons his intention to export them. No case was cited to the Board deciding that in such a case as the present the person intending to export prohibited goods has a locus poenitentiae.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 35 of 1948), from a judgment of the West African Court of Appeal (Gold Coast Session) (November 29, 1947), affirming a judgment of the Supreme Court of the Gold Coast (July 19, 1947), which had held that a judgment of the District Magistrate at Accra (March 8, 1947), had rightly found on the evidence that the appellants had (as alleged by the respondent in his writ of summons) between October 24 and 29, 1945, brought certain cotton and silk goods to the premises of one Sassine at Accra for the purpose of the goods being exported without a licence, but which had further held that the District Magistrate was wrong in construing the Export (Restriction) Order, 1940, as not applying to the export alleged to have been contemplated by the appellants.

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* *Present:* LORD SIMONDS, LORD NORMAND and LORD OAKSEY.

The following is a summary of the facts as found by the magistrate.

The first appellant, Aboul Rachanan Tamim, arrived in the Gold Coast from Dakar on August 21, 1945, and received permission to stay for two weeks, but extensions were granted until October 10, 1945, and he in fact left on October 27, 1945. During his stay he made the acquaintance of Sassine, who ran a transport service from Accra to Nigeria through Lome in French Togoland, and the second appellant, Philip Younis Zacca. Tamim caused his partner in Dakar to transfer to him in Accra some 22,000*l.*, Tamim stating that he wanted the money to set up in business in the Gold Coast. Before the money arrived Tamim bought goods on credit, and when the money arrived the goods bought were paid for. All the goods thus bought were sent to Zacca's wholesale warehouse about October 24, 1945. No licence for the export of those goods had been granted, nor was any application for a licence made. About October 25, 1945, Sassine had an interview with Tamim and Zacca at Zacca's office. Tamim said that he and Zacca had cotton and silk goods then in Zacca's warehouse for transport to Lome. As Zacca purported to be expecting a shipment to arrive and therefore to want room, Sassine agreed to take the goods to his (Sassine's) warehouse and to carry them thence to Lome. As thus arranged Sassine moved the goods to his own warehouse. Later Tamim instructed Sassine to hand over the goods to Zacca. On October 29, 1945, the Gold Coast police instructed Sassine not to move the goods without police authority. On November 6, 1945, customs officers removed the goods from Sassine's warehouse.

On October 5, 1946, the respondent, the Comptroller of Customs (Gold Coast), by writ of summons instituted the present suit in the court of the District Magistrate at Accra against the appellants, alleging that the cotton and silk goods were brought to Sassine's premises for the purpose of their being exported without a licence contrary to the terms of the Export (Restriction) Order, 1940, made pursuant to the provisions of s. 3, sub-s. 1, of the Import, Export and Customs Powers (Defence) Ordinance, 1939, and the respondent claimed forfeiture of the goods and the imposition of 500*l.* penalty on each of the appellants.

The magistrate thought that the irresistible conclusion to be drawn from the facts was that both Tamim and Zacca intended to export the goods without licence, and had bought them for that purpose.

In the Supreme Court the acting judge (Quashie-Idun, Ag.J.) reviewed the facts and sustained the finding of facts of the magistrate. The West African Court of Appeal (Harragin, C.J., Gold Coast; Verity, C.J., Nigeria; and Lucie-Smith, C.J., Sierra Leone) held that not only was there abundant evidence to justify the findings by the two lower courts, but that it was difficult to imagine that any court could have come to other conclusions.

The material sections of the Ordinances in question were as follow: The Import, Export and Customs Powers (Defence) Ordinance, 1939, No. 29 of 1939, s. 3, sub-s. 1: "The Governor "may by order make such provisions as he thinks expedient for "prohibiting or regulating, in all cases or any specified classes of "cases, and subject to such exceptions, if any, as may be made "by or under the order, the importation into or exportation from "the Gold Coast or any specified part thereof, or the carriage "coastwise or the shipment as ships' stores, of all goods or goods "of any specified description".

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Section 5, sub-s. 1: "If any goods—(*a*) are imported, exported, "carried coastwise or shipped as ships' stores in contravention "either of an order under this Ordinance or of the law relating "to trading with the enemy, or (*b*) are brought to any quay or "other place, or waterborne, for the purpose of being exported "or of being so carried or shipped in contravention either of "an order under this Ordinance or of the law relating to trading "with the enemy, those goods shall be deemed to be prohibited "goods and shall be forfeited; and the exporter of the goods or "his agent, or the shipper of the goods, shall be liable, in "addition to any other penalty under the enactments relating "to customs, to a customs penalty of 500*l*.".

The Export (Restriction) Order (No. 35), 1940, s. 1: "No "goods of any description whatsoever other than passengers' "baggage shall be exported from the Gold Coast except under "licence granted by the Comptroller of Customs. It shall be "within the absolute discretion of the Comptroller of Customs "to grant or withhold such licence and to impose such terms "and conditions as he may think fit in respect of the grant "thereof".

The Customs Ordinance, s. 145, sub-s. 1: " All duties, and " all pecuniary penalties not specifically designated fines, and " all forfeitures incurred under or imposed by the customs laws, " and the liability to forfeiture of any article seized under the " authority thereof, may be sued for, determined, enforced, " and recovered by suit or other appropriate civil proceeding in " a Magistrate's Court which court is hereby invested with the " necessary jurisdiction for the purpose, in the name of the " Comptroller as nominal plaintiff; and all such proceedings " shall be deemed to be civil proceedings, and, except as other- " wise herein or hereunder provided, the ordinary civil procedure " of the Gold Coast shall apply thereto. And the fact that the " duties of Customs have been secured by bond or otherwise shall " not be pleaded or made use of in answer to or in stay of any " such proceedings ".

* * * * * *

" (3.) When any person shall be brought before a court in the " exercise of its civil jurisdiction for any offence against the " customs laws in respect of which the duty-paid value of the " articles liable to forfeiture and sought to be forfeited does " not exceed, in the case of potable spirits, fifty pounds, or in the " case of any other articles, twenty-five pounds, the court may " proceed to hear and determine the cause or matter summarily " and without a writ of summons or other formal process, but " otherwise in accordance with the provisions of the customs laws " ordinarily applicable to such offence, as well with respect to " forfeiture as otherwise: Provided that in such case the " pecuniary penalty imposed by the court shall not exceed, in " the case of potable spirits, fifty pounds, or in the case of any " other articles, twenty-five pounds ".

The Courts Ordinance. Third Schedule. Order 25:

" 1. Suits shall ordinarily be heard and determined in a " summary manner without pleadings; but, where it appears to " the court (for reasons recorded in the minutes) that the nature " and circumstances of any case render it expedient in the " interests of justice to do so, the court may order the plaintiff to " file a written statement of his claim (called the petition), and " may likewise order the defendant to file a written answer or " statement of his defence. The filing of a petition shall not " necessarily involve, unless the court so directs, that an answer " shall also be filed. The order may be made at any stage of a " suit, either before or at the hearing ".

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1951. May 30, 31. *Blackledge, K.C.*, and *Ralph Parikh* for the appellants. There was no jurisdiction for the magistrate to try the case without pleadings. This point was not taken in any of the courts below, but a point as to jurisdiction can be taken at any stage. Under sub-s. 3 of s. 145 of the Customs Ordinance the court may hear a matter without pleadings in a case under a certain amount, and it is submitted that there must be implied an intention in the legislature that where the amount is greater then it cannot be tried without pleadings, but will be tried "in "accordance with the provisions of the customs laws ordinarily "applicable to such offence". There is a basic right to have pleadings, and sub-s. 3 of s. 145 is a limitation of the authority given by sub-s. 1 of s. 145, so that the jurisdiction granted by sub-s. 1 is a limited jurisdiction in that sense.

It is submitted that both the appeal courts below dealt with the matter on the basis of whether there was evidence to justify the findings of fact by the trial magistrate. Where there is a right to re-hear then, subject to the principles that have been laid down, there is a duty to re-hear, and not to treat the matter merely on the ground of whether there was evidence to justify the finding: *Powell* v. *Streatham Manor Nursing Home* (1). The real question is, having regard to the findings of fact, what is the reasonable inference to be drawn from them, and that is still open to this Board. With regard to the Board's practice when there are concurrent findings of fact, see *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* (2). The court below was not entitled to infer an intention to export merely from the circumstances as they existed. If the Board is of the opinion that the appeal court did consider the facts and arrive at its own conclusion, that would exclude the question whether there ought to be a re-hearing, and the appellants would be restricted to the question whether on the facts there was evidence to justify the findings of the courts below. The appellants were not guilty of the infringement of the customs laws alleged against them. Tamim had not deposited the textile goods in Sassine's warehouse for immediate or unlawful export but for safe custody, to be returned on demand or to be dealt with on his future instructions, and exported if the necessary permits could be obtained. In any case, at the time of the seizure any intention there may have been of exporting the goods had been abandoned, and the seizure was therefore illegal. Further, the purpose of exporting

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(1) [1935] A. C. 243, 263.

(2) [1946] A. C. 508, 521–2.

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was not a completed purpose at that time. This is a penal statute, and an intended exportation does not mean "exported" within the meaning of s. 5 of the Import, Export and Customs Powers (Defence) Ordinance.

Gahan and *J. G. Le Quesne* for the respondent, were only required to deal with the jurisdiction point. The main submission is that here there was nothing affecting jurisdiction; the proceedings were proper and regular throughout—there was not any semblance of irregularity. In s. 145 of the Customs Ordinance there is in sub-s. 1 a provision that "the ordinary civil procedure "of the Gold Coast shall apply" in forfeiture suits. Then in sub-s. 3 of s. 145 there is provision for dealing summarily with cases of small importance. If there are proceedings which fall within sub-s. 3 there is no need for a writ of summons or other formal process, but if you are proceeding under sub-s. 1, there must be a writ of summons or whatever other process is proper to the case—there was a writ of summons in the present case—and Ord. 25, r. 1, of Sch. III to the Courts Ordinance provides that such suits "shall ordinarily be heard and determined in a "summary manner without pleadings".

[He was stopped.]

June 27. The judgment of their Lordships was delivered by LORD OAKSEY. This is an appeal from the judgment of the West African Court of Appeal which affirmed a judgment of the Supreme Court of the Gold Coast, which reversed a judgment of the Court of the District Magistrate, Accra, dismissing the claim of the respondent for the forfeiture of certain textile goods, and the imposition of penalties. All three courts have found as a fact that the appellants were guilty of bringing certain cotton goods to a place for the purpose of export from the Gold Coast without a licence. The district magistrate dismissed the case against the appellants on a construction of the Import, Export and Customs Powers (Defence) Ordinance, 1939, which is no longer contended for by the appellants in view of the decision of their Lordships' Board in *Attorney-General for Palestine* v. *Fakhry Ayyas* (3) that export by land as well as by sea is prohibited.

Mr. Blackledge in an able argument has contended, on behalf of the appellants, firstly that the magistrate had no jurisdiction to try the case, as he did, without pleadings; secondly, that the goods were not at the time of seizure being exported within the meaning of s. 5, sub-s. 1 (*b*), of the Import, Export and Customs Powers (Defence) Ordinance, 1939; thirdly, that in any event at the time of seizure the appellants had abandoned any intention of exporting the goods and that in such circumstances the seizure was illegal; and lastly, that the concurrent findings of fact that the appellants intended to export the goods and were exporting them without a licence were not justified by the evidence.

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(3) [1947] A. C. 332.

The material sections of the Ordinances in question are as follows:—[His Lordship quoted the sections of the Ordinances set out above and continued:] Their Lordships do not find it necessary to state the facts in detail. They are satisfied that there was ample evidence to support the findings of the three courts that the appellants were engaged in exporting the goods in question without a licence and they see no reason to differ from those findings. Their Lordships are also of opinion that there is no substance in the appellants' other contentions. By Ord. 25 of Sch. III to the Courts Ordinance, suits shall ordinarily be heard without pleadings, and by s. 145 of the Customs Ordinance, penalties and forfeitures may be sued for, determined, enforced and recovered by suit in a magistrate's court and the ordinary civil procedure shall apply to such proceedings. It was therefore the ordinary and regular procedure for the magistrate in the present case to try the suit against the appellants upon the writ of summons without pleadings as he did, and there is nothing in s. 145, sub-ss. 1 and 3, which made it irregular for him to do so.

Mr. Blackledge also argued that in having the goods moved from Zacca's warehouse to Sassine's premises there was no evidence of exportation, but, as the courts below were all of opinion that the goods were moved to Sassine's premises for the purpose of being exported, their Lordships are of opinion that the goods were brought to that place for the purpose of being exported within the meaning of s. 5, sub-s. 1 (*b*), and that the appellants, who both took part in bringing them there, were exporters within the meaning of the section.

Lastly, their Lordships are of opinion that a person is liable to the prescribed penalty and to forfeiture of the goods if he takes part in bringing prohibited goods to a place for the purpose of export, even if before seizure of the goods he abandons his intention to export them. No case was cited to their Lordships deciding that in such a case as the present the person intending to export prohibited goods has a locus pœnitentiæ.

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ABOUL RACHANAN TAMIM
v.
COMPTROLLER OF CUSTOMS.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *A. L. Bryden & Williams; Burchells.*

H. L. (Sc.).*

1951
March 15;
April 5.

Ex parte WESTBURN SUGAR REFINERIES LD.

Company—Reduction of capital—Formation of investment-holding company—Transfer of stocks and shares held by petitioning company—Allotment of shares in investment-holding company—Shares exceeding in value nominal reduction of capital—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 66, *sub-s.* 1.

By s. 66, sub-s. 1 (*c*) of the Companies Act, 1948, a company is authorized, subject to confirmation by the court, to " pay off any " paid-up share capital which is in excess of the wants of the " company ".

In a reduction of capital it is competent for a company to pay off share capital by transferring to the shareholders assets of which the value may exceed the amount by which the share capital is reduced, and the court should sanction the reduction provided that it is satisfied as to the safeguarding of the interests of the creditors, of the shareholders and of the public who may have dealings with the company or may be minded to invest in its securities.

If the reduction is not objectionable on other grounds, the fact that it may have an ulterior motive (e.g., where a company threatened with nationalization adopts this method of parting with valuable assets) is not a reason why the court should withhold its sanction.

Decision of the First Division of the Court of Session 1951 S. C. 190 reversed.

APPEAL from the First Division of the Court of Session.

The appellant company, Westburn Sugar Refineries Ld. (hereinafter called " Westburn "), was incorporated in 1897. By art. 50 (*d*) of its articles of association it was empowered by special resolution to reduce its share capital in any manner authorized by the statutes. Its share capital was 609,000*l.* divided into 609,000 ordinary shares of 1*l.* each fully paid. All the shares had been converted into ordinary stock. In 1950, it presented a petition for confirmation of a reduction of capital, averring that the capital was in excess of its requirements and that certain assets were not essential to its main business and should be segregated. There was no opposition by any shareholder at any time. The court remitted the petition for inquiry and report to Hugh Spens and from his report the facts following also appear.

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* *Present:* LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD REID and LORD RADCLIFFE.

Westburn formed an investment holding company Lynedoch Investments Ld. (hereinafter called " Lynedoch ") incorporated on February 27, 1950. On June 12, 1950, Westburn entered into a provisional agreement with Lynedoch in terms of which Westburn sold to Lynedoch for 60,900*l*. certain investments, viz., shares, stock or debentures in six different companies, at values which in the aggregate amounted to 45,192*l*., and Government stock standing at the figure of 15,708*l*. The capital of Lynedoch was 100*l*. divided into 1,000 shares of 2*s*. each, for which Westburn subscribed at par, and was to be increased to 60,900*l*. divided into 609,000 shares at 2*s*. each. The price was to be settled as to 100*l*. in cash and as to the balance by the allotment to Westburn or its nominees of 608,000 shares of 2*s*. each in Lynedoch credited as fully paid.

On July 12, 1950, Westburn passed special resolutions: (a) approving and confirming the agreement; (b) reconverting the 609,000*l*. ordinary stock into 609,000 ordinary shares of 1*l*. each; (c) reducing the capital of Westburn from 609,000*l*. divided into 609,000 ordinary shares of 1*l*. each to 548,100*l*. divided into 609,000 ordinary shares of 18*s*. each; such reduction being effected by the return of 2*s*. per share, thus reducing the nominal amount of each share from 1*l*. to 18*s*. on the basis that such return should be satisfied by the transfer on allotment to the holders of each share of one fully paid share of 2*s*. in Lynedoch; (d) converting the 609,000 shares of 18*s*. into stock transferable in units of 18*s*. and increasing the capital to its original figure of 609,000*l*. by the creation of 609,000 ordinary shares of 2*s*. each. The resolutions were passed unanimously.

The reporter received a letter and statement from the auditors on the basis of which the value of the investments sold to Lynedoch was far in excess of 60,900*l*., the total sum being 197,768*l*. It was difficult to value these investments since the companies in which they were held were private companies. The reporter expressed the opinion that " the shares in Lynedoch are " clearly worth more than par ". In those circumstances a question arose whether in a reduction of capital, where capital was being repaid to shareholders there could be paid out more than the money value of the reduction by the transfer of shares or assets, which had in fact a higher value, in satisfaction of the payment. The values taken for the purposes of the transfer were those at which the investments stood in the books of Westburn and the result of the reduction was that 60,900*l.* of capital would disappear from the liability side of the balance sheet and 60,900*l.* from the assets side. The shares and debentures which Westburn was to transfer to Lynedoch were categorized respectively in Westburn's balance sheet dated October 1, 1949, under the headings " trade investments ", " subsidiary company " and " unquoted investments ".

The reporter stated (para. 12) that " so far as the share-" holders are concerned . . . it does not matter whether the assets " transferred to Lynedoch by Westburn are worth more than " 60,900*l.* If only assets to the value of 60,900*l.* are transferred, " each 18*s*. of stock in Westburn is worth more, and a 2*s*. share " is worth 2*s*. If assets to a greater value than 60,900*l.* are " transferred, the 2*s*. share in Lynedoch is worth more than 2*s*. " and each 18s. of stock is worth less by the equivalent " amount ". Para. 13: " As regards creditors, Westburn's " position is a very strong one . . .".

As at October 1, 1949, the position, in accordance with the balance sheet, was that the current assets stood at 1,014,889*l.* and consisted of stocks (" as certified by the company's " officials "), book debts and payments in advance, British Government stock and cash at banks and on hand. It was stated in the petition that the above were exclusive of the assets to be transferred to Lynedoch. At March 31, 1950, the current assets were 857,283*l.* as against liabilities of 285,921*l.*, showing a surplus of 571,362*l.* The reporter stated: " The creditors are amply " provided for. It is also clear that the capital of the company " is in excess of its requirements ". Finally he said that " the " shareholders . . . are certainly not prejudiced " and " the " creditors are amply protected ".

In the balance sheet of October 1, 1949, the fixed assets retained (excluding a negligible amount of house property) were entered at a valuation " as at June 30, 1948 ", plus some subsequent additions at cost, and minus depreciation for the whole intervening period. This gave a figure of 442,948*l.*

The court refused the prayer in the petition and Westburn appealed to the House of Lords.

Clyde, K.C. (of the Scottish Bar), *Philip Sykes* (of the English Bar), and *R. H. McDonald* (of the Scottish Bar) for the appellant company. The balance sheet shows that the company has paid-up share capital substantially in excess of its wants and that after the proposed reduction of capital it will have assets exceeding the amount of its liabilities and paid-up share capital. In determining whether or not to confirm the reduction the only relevant considerations for the court are the interests of the creditors, the shareholders and the members of the public who may become shareholders. To return 2*s.* a share does not necessarily mean returning it in cash; it means that the paid-up capital is reduced by one-tenth. One way to reduce capital is to pay over assets. It is sufficient to prove that the assets proposed to be applied in satisfaction of the paid-up share capital to be returned is not less in value than that share capital. There is ample evidence that this is so. The assets balance the liabilities, for there is to be cancellation of the same amount of assets and liabilities. The future investor will see in the balance sheet that the capital has been reduced on the one side and certain assets have disappeared from the other. The balance sheet will therefore give him the same amount of encouragement as before. The valuation given to the investments in the books of the company is at least prima facie evidence of value. The Companies Act does not prescribe the manner in which a reduction of capital should be effected. There is no limitation placed on the court's power to confirm it, save that it must be satisfied that all creditors entitled to object to the reduction have either consented or been paid or secured.

The law on the point in question is to be found in Buckley on the Companies Acts (12th ed.), p. 158; *Caldwell & Co. Ld.* v. *Caldwell* (1), *per* Lord Parker of Waddington and Lord Shaw of Dunfermline; *Poole* v. *National Bank of China Ld.* (2); *British and American Trustee & Finance Corporation Ld.* v. *Couper* (3); *Balmenach-Glenlivet Distillery Ld.* v. *Croall* (4); *In re Thomas De La Rue & Co. Ld.* (5).

The result of the authorities is that it is not necessarily fatal to the petition that it has not been demonstrated that a specific item among the investments transferred is entered in the balance sheet at its full value and also that that amount is surplus to the company's requirements. It is impossible to particularize to that extent. The proper way to look at the matter is to consider whether there is ground for saying that the company's share capital is in excess of its wants. That has been demonstrated. The question of the amount of the consideration to be given to the shareholders is for the company to decide and the court should confirm the reduction unless the scheme is a deliberate device to defraud the shareholders or is unfair to them, or unless it is unjust and inequitable to transfer the assets as proposed. In the present case neither the actual nor the nominal value of the Lynedoch shares is a relevant consideration for the court. Their value provides no justification for refusal to confirm the reduction. There is ample proof of all the material facts relevant to the question before the court.

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(1) 1916 S. C. (H. L.) 120, 121, 124.

(2) [1907] A. C. 299.

(3) [1894] A. C. 399, 405–6.

(4) (1906) 8 F. 1135, 1141.

(5) [1911] 2 Ch. 361.

Their Lordships took time for consideration.

April 5. LORD PORTER. My Lords, I have had the opportunity of reading the opinion of my noble and learned friend Lord Radcliffe and find myself wholly in agreement with it. I therefore move that the appeal be allowed.

LORD NORMAND. My Lords, I agree with my noble and learned friend on the woolsack that the appeal should be allowed.

The general rule is that the prescribed majority of the shareholders are entitled to decide whether there should be a reduction of capital and if so in what manner and to what extent it should be carried into effect. When the reduction is consequent on a change in the method of carrying on the company's business it is for the shareholders to decide to what extent its capital is in excess of its wants and on the adequacy of the consideration for the reduction of their share capital. But the powers of the shareholders must be exercised so as to safeguard the rights of creditors, the just and equitable treatment of shareholders, and the interests of the investing public. These principles are affirmed in the following cases: *British and American Trustee & Finance Corporation Ld.* v. *Couper* (6); *Poole* v. *National Bank of China Ld.* (7); *Caldwell & Co. Ld.* v. *Caldwell* (8); and *In re Thomas de la Rue & Co. Ld.* (9).

To come to the present case, I think it clear, according to the foregoing principles, that in consideration of the reduction of share capital the shareholders may decide to accept a transfer of assets to a holding company the shares of which are to be held by them according to their respective interests in the capital of the transferor company and that the shareholders can also decide that the transfer shall be of such investments as are according to their value in the company's balance sheet the equivalent of the amount of the proposed reduction of share capital.

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(6) [1894] A. C. 399.
(7) [1907] A. C. 299.
(8) 1916 S. C. (H. L.) 120.
(9) [1911] 2 Ch. 361.

But in an arrangement in which assets are taken at balance sheet values there is the possibility that the scheme of reduction may be used as a means of defeating or injuring the rights of creditors or deceiving future investors. If the retained assets are entered in the company's balance sheet at a figure in excess of their real value, creditors may be prejudicially affected, and it may also be possible by adjustments in the balance sheet after the reduction takes effect to return paid up capital to shareholders. The suspicion that a manœuvre to milk the company of its capital is on foot may reasonably be aroused when the company's business is threatened by proposals to nationalize it.

The First Division were therefore, in my opinion, only performing the duty cast upon them by the statute when they scrutinized the proposed reduction with special attention. They had to be satisfied that the rights of creditors and the interests of shareholders actual and prospective were not being sacrificed or injured. The material matter is not the value of the investments which the company proposes to transfer, but the value of those assets which it will retain. And on this the court had the advantage of a careful and lucid report by the experienced reporter to whom it had remitted the petition for confirmation.

The report bears that the company is in a strong position as regards its retained assets and its liabilities, that the creditors are amply provided for, and that it is clear that the company's capital is in excess of its requirements. The reporter says also that the shareholders are certainly not prejudiced by the proposals. If there had been any doubt upon any aspect of the proposals I think the proper course would have been to make a further remit to the reporter with specific directions to investigate and report on the points in doubt. But the reporter in this instance had already shown himself alive to the kind of objection that might be taken, and in addition to his report we have before us the balance sheet from which it appears that the valued assets retained are entered at figures ascertained by a recent re-valuation. I have therefore no hesitation in holding that the proposed reduction is not open to objection and may properly be confirmed.

I think that the proper course is to allow the appeal and to send the case back for the Court of Session to dispose of it in accordance with the judgment of this House.

LORD OAKSEY. My Lords, I agree.

LORD REID. My Lords, s. 66, sub-s. 1 (*c*), of the Companies Act, 1948, authorizes a company, subject to confirmation by the court and if certain conditions have been satisfied, to " pay off " any paid-up share capital which is in excess of the wants of the " company ". In this case the statutory conditions have been satisfied. The question is whether the court should confirm the reduction of capital proposed. The only unusual features of this case are that the appellants propose to pay off part of their share capital not with money but by transferring to the shareholders shares of another company, and that the value of the shares proposed to be so transferred greatly exceeds the amount by which the appellants' share capital is to be reduced. But there is nothing novel in paying off share capital otherwise than with money: it has long been recognized that this is not incompetent.

The real questions in this case are whether it is competent in a reduction of capital to pay off share capital by transferring assets whose value clearly exceeds the amount by which the share capital of the company is reduced; and if this is competent, whether it is proper in this case to allow it to be done. As regards competency " the statute has not prescribed the manner in which the " reduction is to be carried out, nor has it prohibited any method " of effecting that object " (*per* Lord Herschell, L.C., in *British and American Trustee & Finance Corporation Ld.* v. *Couper* (10)). And in the same case Lord Watson said (11): " I do not find a " single expression in the Act tending to indicate that the dis- " cretion of the court to grant or refuse such an application does " not extend to every possible mode of reducing capital ".

The terms of the Act are as wide today as they were then. At first sight it may seem strange that the appellants' proposal should be competent; but once it has been recognized that paying off capital can be done otherwise than by payment of money, there cannot be any requirement of exact correspondence between the amount of capital paid off and the value of the assets used to pay it off, because in many cases it is impossible to make any exact valuation of such assets. So the most that could be required would be an approximate correspondence; but I can see no reason why it must be held that the statute has imposed any such vague or difficult limitation.

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(10) [1894] A. C. 399, 405.

(11) Ibid. 410.

I therefore turn to the second question. Are the circumstances of this case such that the court ought to confirm the appellants' proposal? In effect what is proposed is to transfer to the shareholders assets which are valued in the appellants' sheet at sums which in total correspond exactly with the amount by which the share capital is to be reduced, but which may be worth rather more than three times the balance sheet values. I say " may be " because the nature of most of these assets is such that any close estimate of their value is impossible.

What, then, is the duty of the court in considering a matter of this kind? In the first place the interests of creditors must be safeguarded; but here that has been done. Secondly the interests of shareholders may have to be considered: but in this case there has been no opposition by any shareholder at any time and it is difficult to see how there could be any prejudice to any single shareholder. And thirdly there is the public interest to consider: that this is a relevant consideration was clearly recognized by Lord Macnaghten in *Poole* v. *National Bank of China Ld.* (12). I would not be disposed, by attempting to define the public interest, to narrow in any way the discretion of the court in any future case. But in a case like the present I think that it is right to scrutinize the facts somewhat closely, having in mind the position of those who may in future form connexions with the company as creditors or shareholders. It appears to me to be proper to consider what assets the company will retain if the proposed reduction of capital is confirmed. In this case the assets to be distributed taken at their real value form only a comparatively small part of the total assets of the company. The value of the assets to be distributed has been estimated at 197,768*l.*, and the value of the assets to be retained by the company as shown in the balance sheet exceeds 1,400,000*l.* It seems clear that the true value of these assets cannot be substantially less than that amount. The total capital of the company before reduction is 609,000*l.* and liabilities to creditors and others did not exceed 500,000*l.* at the time of the last balance sheet. In my opinion these facts are amply sufficient to remove any apprehension that

(12) [1907] A. C. 229, 239.

the future conduct of the company may be adversely affected by confirmation of the present proposal.

It has been said that there are other matters concerning the public interest to be taken into account in this case. Lord Carmont took the view that there is or may be an ulterior object behind the present petition, namely to avoid in part the consequences of possible future legislation. The fact that the petitioners may have such an ulterior object may be a good reason for making quite certain that the existing law is complied with in every respect, but it cannot in my judgment be by itself a ground for dismissing the petition. The petition must be judged by the law as it exists today. Finally I should notice the fear expressed by the Lord President that the decision of this case in favour of the petitioners may " open a wide door to the most dangerous " possibilities " (13). The case does not strike me in that way. The powers of the court to deal with cases of this kind are wide and are I think adequate to enable new difficulties which may emerge to be dealt with justly when they arise.

LORD RADCLIFFE. My Lords, this appeal raises what is to me a novel point in connexion with the reduction of the share capital of a limited company. Consideration of it has led the First Division of the Court of Session, by a majority, to dismiss the appellant company's petition for the court's sanction of the reduction proposed. I think that this refusal arises from some misapprehension of the relevant law governing the reduction of a company's share capital and that the court's sanction ought not in the circumstances to have been withheld.

The point that has caused this difficulty relates to the value of the assets with which the company proposes to satisfy its obligation to return to its shareholders a portion of the paid-up share capital. The scheme itself is simple. The company has formed and subscribed for 1,000 2*s*. shares in a new company, styled " Lynedoch Investments Limited " (which I will hereafter refer to as " Lynedoch "), and has provisionally agreed to transfer to that company (a) certain shares and debentures which form part of the assets of the appellant company, and (b), a sum of 3 per cent. Funding Stock. In exchange Lynedoch is to pay 100*l*. in cash and to issue to the appellant company or its nominees 608,000 shares of 2*s*. each in the capital of Lynedoch, credited as fully paid. The appellant company has only one class

(13) 1951 S. C. 190, 200.

of shares, represented by 609,000*l*. ordinary stock, issued and fully paid up, and the scheme is that, the ordinary stock having been reconverted into shares, a return of paid-up capital to the extent of 2*s*. per share is to be made to the ordinary shareholders and that each 2*s*. is to be satisfied by the transfer or allotment to the shareholder concerned of one of the Lynedoch shares which the company holds or is to receive. This operation involves, of course, a reduction of the company's paid-up share capital from 609,000*l*. divided into shares of 1*l*. each to 548,100*l*. divided into the same number of shares of 18*s*. each, and the necessary resolutions of the company have been passed for this purpose.

There is no doubt that the company is competent to proceed in this way. Its articles authorize the reduction of capital, subject to the approval of the court. The Companies Act, 1948, by s. 66, gives to the court the statutory power of confirmation. The return of capital is to be effected by a distribution of assets, not by tender of money: but I think that it is settled that money's worth may be resolved on as the means of repayment as validly as money itself. Nor, indeed, has the competency of the company been questioned in the Court of Session. What has been questioned is the propriety of a reduction by virtue of which there is returned not merely money's worth but such an amount of the company's assets as may well be worth in money a good deal more than the 60,900*l*. which is the basis of repayment. For Mr. Hugh Spens, to whom in accordance with procedure the petition was remitted for inquiry and report, has brought to the attention of the court certain facts which bear upon the value of the 2*s*. Lynedoch shares and which suggest that their value at the present date is in excess of par.

My Lords, I do not think it necessary to investigate these facts in detail for the purposes of this appeal. All that it is necessary to notice about them is this. The shares and debentures which the company is to transfer to Lynedoch are shares and debentures in private companies, which are categorized in the company's balance sheet under the heading of "Trade "Investments", "Subsidiary Company" or "Unquoted In-"vestments". There is, therefore, no market valuation available for them and any monetary equivalent which is allotted to them is at best a matter of expert opinion. They stand in the company's books at a figure which in the aggregate amounts to 45,192*l*., and it is at this figure that they are being transferred to Lynedoch by the sale agreement. But Mr. Spens obtained information from the company's auditors for the purposes of his

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WESTBURN SUGAR REFINERIES LD., *Ex parte.*

Lord Radcliffe.

report which led him to suppose that the value of the transferred investments was far in excess of the book value of 60,900*l.* and he has explicitly stated in his report that the Lynedoch shares are " clearly worth more than par ".

It is not at first sight apparent why this opinion should constitute any obstacle to the success of the company's application. What is in question is a reduction of capital by repaying some paid-up share capital. If the transaction is itself competent the court should only refuse its confirmation if what is proposed to be done is somehow unfair or inequitable; and the consideration of what is unfair or inequitable cannot well extend beyond consideration of the interests of creditors, shareholders and the general public, by which term is, I think, meant persons who may in the future have dealings with the company or may be minded to invest in its securities. But the report finds that, if the reduction of capital proposed is confirmed, the company's creditors are amply provided for and recommends that the provisions of s. 67, sub-s. 2, of the Act be dispensed with. So the creditors need no protection. As to shareholders, the resolutions in favour of the reduction proposed were passed unanimously and no shareholder has given notice of any objection. Their position is summed up in para. 12 of the report:—" It does not matter " whether the assets transferred to Lynedoch by Westburn are " worth more than 60,900*l.* If only assets to the value of 60,900*l.* " are transferred, each 18*s.* of stock in Westburn is worth more, " and a 2*s.* share is worth 2*s.* If assets to a greater value than " 60,900*l.* are transferred, the 2*s.* share in Lynedoch is worth " more than 2*s.*, and each 18*s.* of stock is worth less by the " equivalent amount ". So the shareholders need no protection. That leaves outstanding the interests of the public, and it is the fear that their interests may be prejudiced by this proceeding that has led the majority of the Court of Session, as I read their opinions, to refuse their approval of the company's petition.

Two reasons are advanced by Lord Carmont for his view. One is that on general grounds of public policy the court ought not to aid a company threatened with nationalization to " eviscerate " itself by parting with valuable assets (14). My Lords, I do not think that the contingency of nationalization has any relevance to the public policy that Courts of Justice should support. If the reduction is objectionable on other grounds, it will not become the more acceptable because it may have been proposed in view of

(14) 1951 S. C. 190, 196.

a pending measure of nationalization: conversely, the threat of nationalization cannot render improper what is otherwise unobjectionable. I pass, therefore, to the second, and, indeed, the main, reason which weighed with the learned judge. In his view it was essential for the company, which showed by its petition that the ground of the proposed reduction was that the share capital to be returned was in excess of its wants, to demonstrate to the court by how much its capital was in fact surplus; and, since the evidence presented to the court was deficient in this respect, a material fact had not been made out (15). Whether this conclusion would on any view have justified a dismissal of the petition, rather than its remitter for further inquiry, I do not think it necessary to discuss; for I think that the conclusion itself is based on a misunderstanding.

I cannot find any good reason why the court should be concerned to know what is the extent by which the company's capital is surplus to its requirements. If by that phrase, itself susceptible of ambiguity, is meant the extent by which the whole of the company's assets, at the best contemporary valuation that can be placed upon them, exceeds what is required for the future conduct of its business, precise information on this would do nothing to aid the task of the court. For it would throw no light on the sole thing which is here in question, how much of the paid-up share capital is to be returned as being surplus. Nor do I think that evidence of this kind is usually required in cases of this sort. In truth this, which is the real question, answers itself by the company's own resolution. When a company has come to employ in its business, as this company has, a volume of assets very much greater in value than the amount of its paid-up share capital, there is no obvious answer to the question how much of that capital it needs for future trading. It is a domestic matter, which the shareholders and their managers must decide among themselves, how much of the paid-up share capital the company can dispense with for the future. If the amount that they have decided upon works no injustice to creditors or to shareholders, I see no purpose which can be served by the court's insisting upon a precise figure of the company's wants or the striking of an exact balance between that figure and the total available resources in hand.

I am not indifferent to the possibility of danger which attends a scheme to return share capital in the form of assets which are of a value substantially greater than the amount of share capital. It is the apprehension of such dangers, I think, that led the Lord President to join with Lord Carmont in dismissing this petition. But where I respectfully differ from his opinion is that in my view those dangers are wholly absent from this case. Firstly, I do not think that your Lordships should treat the Lynedoch shares as having any certain value which is substantially greater than par. Their value depends upon the value of the investments transferred to Lynedoch and these shares and debentures in their turn can only be valued in terms of their underlying assets. The investments themselves are transferred to Lynedoch at the same values as they stand at in the company's books: in most cases at cost. It is no disrespect to the report of Mr. Spens to say that, while his opinion that the Lynedoch shares are worth more than par must, of course, be accepted, he was not in a position, upon the material before him, to say what in fact their value ought to be taken to be. Nor did he essay to do so. There are many kinds of property of which the value cannot be ascertained on any certain principle. There is no kind of property to which value cannot, if it must, be assigned: but in such cases the value accepted depends on the weighing of individual, though expert, judgments and not upon an appeal to any fixed standard. The investments in private companies which we are dealing with here seem to me to be within this class, and I do not think that the company's figure of cost, which is, after all, one form of valuation, should be taken as something markedly different from the true value. That is one consideration.

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(15) Ibid. 194.

But, secondly, the court should not dismiss a petition on a merely theoretical fear of evil consequences. What are the actual circumstances of this case? The company is parting with these investments at the same value as they stand at in its books. If the reduction is effected, 45,192*l.* (I ignore the Funding Loan for this purpose) disappears from one side of the balance sheet and the same amount from the other, in the form of issued share capital. There is nothing in this which, at first sight at all events, appears to threaten to confuse or mislead future traders or investors. I can imagine that there may be companies as to which there might be a reasonable fear that a reduction by way of repaying paid-up share capital by the distribution of assets suspected to be worth more than the monetary equivalent involved would achieve or facilitate the thing which the court must be concerned to prevent, namely a withdrawal of some part of the fund of capital which the company is committed by its

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constitution to retain. That, however, depends on what is left in the company's assets, not on what is taken away from them. It might be that other parts of the assets had suffered substantial depreciation below their book values, so that after the withdrawal proposed it would be plain that there was not " enough to go " round ". It might be that the withdrawal would be followed by large distributions of dividend from reserve or profit and loss so that before long the " capital fund " might have been raided for the provision of dividends.

I am bound to say that I regard these as dangers more theoretical than practical. I do not see how in any ordinary case they would present themselves as actuality to the mind of the court, at any rate in a case such as this in which the assets withdrawn are withdrawn at their book value. At most they might lead a court to call for further evidence to show that others of the retained assets had not depreciated substantially below their book values. I can only say that I think that such a precaution would be quite unnecessary in this case. Of the other assets in the company's balance sheet as at October 1, 1949, the fixed assets (excluding a negligible amount of house property) are entered at a valuation " as at June 30, 1948 ", plus some subsequent additions at cost and minus depreciation for the whole intervening period. This gives a figure of 442,948*l*. The current assets stand at 1,014,889*l*. and consist of stocks " as certified by the company's officials ", debtors and payments in advance, together with large sums of British Government securities and cash at bankers and on hand. It seems to me demonstrable on that state of affairs that there is no interest of the public that can be prejudiced by the reduction proposed. And that is the only thing that is now in question.

I think that the appeal should be allowed and the case remitted to the Court of Session with a direction that the reduction mentioned in the petition ought to be confirmed and the consequent formalities completed.

Appeal allowed.

Solicitors: *Slaughter & May for Davidson & Syme, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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Feb. 13, 14,
15, 19, 20;
May 8.

HARRISON . . . . APPELLANT;

AND

NATIONAL COAL BOARD . . . . RESPONDENTS.

Mines—Statutory duty—Breach—Shot-firing—Mine-worker injured by explosive—Liability of mine-owner or manager—Common employment—General Regulations, 1913, *made under s.* 86 *of the Coal Mines Act,* 1911 (*St. R. & O.* 1913, *No.* 748), *reg.* 1—*Explosives in Coal Mines Order,* 1934, *made under s.* 61 *of the Coal Mines Act,* 1911 (*St. R. & O.* 1934, *No.* 6), *arts.* 2 (*e*), (*h*); 6 (*a*)—*Coal Mines Act,* 1911 (1 & 2 *Geo.* 5, *c.* 50), *ss.* 61, 74, 75, 86, 89, 90.

By reg. 1 of the General Regulations, 1913, made under s. 86 of the Coal Mines Act, 1911, a duty is imposed on the manager and under-manager of a coal mine " to carry out and to the best of their " ability enforce " the provisions of every Order regulating the use of explosives in mines.

By the Explosives in Coal Mines Order, 1934, made under s. 61 of the Act the manager of a coal mine is required by art. 6 (*a*) to appoint in writing competent persons as shot-firers, who alone shall perform the duties of firing shots, and by art. 2 (*e*) and (*h*) there is imposed on the shot-firer the duty of seeing, before firing a shot, or coupling the cable to the firing apparatus, that all persons in the vicinity have taken proper shelter.

Before the Law Reform (Personal Injuries) Act, 1948, which abolished the defence of common employment, came into force, a coal-face worker suffered injury, through the admitted failure of a shot-firer to perform his duty under art. 2 (*e*) and (*h*). He brought an action for damages against the mine-owners, his employers, alleging breach by them of their statutory duty.

Held (*per* Lord Porter, Lord Normand, Lord Oaksey and Lord MacDermott, Lord Reid dissenting) that the mine-owners were not liable in damages to the workman for the shot-firer's breach of statutory duty because the workman and the shot-firer were fellow workmen and art. 2 (*e*) and (*h*) does not impose on the mine owners a direct or personal duty such as would render the doctrine of common employment inapplicable.

Per Lord MacDermott: There is no general principle that a master cannot be responsible for a breach of a statutory duty laid on his servant.

Held, further, assuming that the manager of the mine was not the fellow servant of the injured workman, that reg. 1 of the General Regulations, 1913, imposed on him, not an absolute duty, but a duty to carry out and enforce to the best of his ability the provisions in question, and in this he was not at fault.

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* *Present:* LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD MACDERMOTT and LORD REID.

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Per Lord Porter and Lord Normand: The manager was a fellow servant of the shot-firer and the injured workman.

Decision of the Court of Appeal [1950] 1 K. B. 466, affirmed.

APPEAL from the Court of Appeal (Tucker, Singleton and Jenkins, L.JJ.).

The facts, stated by Lord Porter, were as follows:—On January 27, 1948, the workman (the appellant) was employed by the mine-owners (the respondents) at their North Gawber Colliery as a stone contractor and coal-face worker, and was driving a drift from one seam to another when it became necessary to have a shot prepared and fired to loosen the stone. The workman bored three holes in which the charges should be placed, and sent for the deputy, one Joseph Spence, who was the authorized shot-firer for that part of the mine. The shot-firer came to the drift soon after and prepared to charge and fire the shots. The workman was then engaged, in accordance with his duties, in making the place ready for the firing of the shots by removing tools from the vicinity and laying down iron sheets known as flags. After the shot-firer had put in the shots, stemmed them and coupled his shot-firing gear to the detonator wires, he ran out his cable and went out of the drift, leaving the workman in the drift. The shot-firer then fired a shot without giving any warning to the workman, who suffered severe lacerations and abrasions.

On these facts the workman brought an action against the mine-owners alleging that his injuries were caused by breaches of duty on their part or on the part of those for whose acts and omissions they were liable. In the court of first instance the workman also relied on breach of common law duty on the mine-owners' part, but as admittedly the workman and the shot-firer were engaged in a common employment and that fact constituted a defence at the time of the accident, he confined his claim in the Court of Appeal to a breach or breaches of statutory duty.

By their defence and at the trial the mine-owners alleged that the duties imposed by art. 2 (*e*) and (*h*) of the Explosives in Coal Mines Order, 1934, were not imposed upon them but upon the shot-firer personally; and that if he was in breach of such duties the defence of common employment applied.

The action was tried by Jones, J., at Leeds Assizes. At the trial the mine-owners did not call the shot-firer as a witness, but called evidence, which the learned judge accepted, that they took all reasonable means by publishing the regulations relating to shot-firing to secure compliance with them and that they took all precautions to ensure that shot-firing should be carried out with care.

The contention on behalf of the workman was that upon proper construction of art. 2 (*e*) and (*h*) of the Explosives in Coal Mines Order the duty, though imposed upon the shot-firer to whom the work of shot-firing was entrusted, was also a duty imposed upon the mine-owner, inasmuch as such work was a necessary part of the mine-owner's operations; and that unless the language used in the Order was such as clearly to confine the duty to the shot-firer in his personal capacity it ought not to be so read. The learned judge held that the duty was merely personal to the shot-firer.

In the Court of Appeal the workman contended that the duty infringed was also one imposed upon the manager of the mine by the express terms of reg. 1 of the General Regulations, 1913. It was said that this point was not covered by the statement of claim, and the Court of Appeal took that view. Nevertheless they heard full argument upon it and decided it. In their view the obligation imposed on the manager under reg. 1 of the General Regulations was in the circumstances merely to do his best to enforce the regulations and the learned judge, having found that he had done so, the manager was not in fault.

The Court of Appeal having affirmed the decision of Jones, J., dismissing the action, the workman appealed to the House of Lords.

Beney, *K.C.*, and *McLuskey* for the appellant workman. The questions are: (*a*) whether under the Explosives in Coal Mines Order, 1934, the relevant duties are imposed on the mine-owners and not merely on the shot-firer Spence; (*b*) whether under the General Regulations, 1913, duties were imposed on the manager; (*c*) if so, whether the manager and the injured workman were in common employment. The answer is that on the true construction of art. 2 (*e*) and (*h*) of the Order of 1934 and the relevant sections of the Coal Mines Act, 1911, the duty, though imposed on the shot-firer, to whom the work of shot-firing was entrusted, was also a duty imposed on the mine-owners, inasmuch as the work was a necessary part of their operations; unless the language used was such as clearly to confine the duty to the shot-firer in his personal capacity it should not be so read. Further, the duty infringed was also imposed on the manager, for whose acts and omissions the mine-owners were responsible, by the express terms of the General Regulations, 1913, reg. 1. The manager was not a fellow workman of the injured man.

As to the duty imposed on the mine-owners, regulations for the safety of employees should be construed, if possible, as imposing a direct obligation on the employer: see *Groves* v. *Lord Wimborne* (1); *David* v. *Britannic Merthyr Coal Co. Ld.* (2); *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (3), *per* du Parcq, L.J.; *Riddell* v. *Reid* (4); *Black* v. *Fife Coal Co. Ld.* (5); *Watkins* v. *Naval Colliery Co. (1897) Ld.* (6); and *Wilsons and Clyde Coal Co. Ld.* v. *English* (7). There is no case in which the courts have decided that either the Order of 1934 or the General Regulations, 1913, merely impose a personal duty on the operative. The present question arises on the language of these regulations. The relevant provisions of the Order of 1934 are very similar to the terms of s. 49 of the Coal Mines Regulation Act, 1887. Prima facie the mine-owners must be liable unless the context, the wording or the substance of the regulations frees them. Thus if a collier concealed a match about his person and took it into the mine his employers could hardly be liable for the consequences, since they have only a limited right of search and they are not required to do the impossible. Nevertheless a heavy burden is often placed on mine-owners to comply with regulations, the compliance with which they cannot physically control or which are very difficult to detect, whatever steps may be taken.

The regulations concerning shot-firing are designed to ensure that this necessary operation shall cause no danger to any employee. They are therefore directed to the method of doing the employer's work. They impose an absolute duty on the mine-owners and this duty is not discharged by showing that they have done their best. It is to be noted that s. 75 of the Act of 1911 prescribes penalties for non-compliance with provisions as to safety and this criminal liability also imposes civil liability for damages for statutory negligence in circumstances which would not otherwise give rise to civil liability. In the present case it has not been contended by the mine-owners that they could escape liability by publishing the rules and that point, therefore, does not arise.

(1) [1898] 2 Q. B. 402.
(2) [1909] 2 K. B. 146; [1910] A. C. 74.
(3) [1941] 1 K. B. 154.
(4) [1943] A. C. 1.
(5) [1912] A. C. 149.
(6) [1912] A. C. 693.
(7) [1938] A. C. 57.

As for the manager's breach of duty, this question depends on reg. 1 of the General Regulations. Here the question is not whether the mine-owners have any direct duty imposed on them but whether the manager and under-manager have a duty and, if so, what duty. The obligation is expressed as a double one: (*a*) "to carry out" and (*b*) "to the best of their ability enforce" the relevant provisions. Liability accordingly attaches unless both are complied with. An absolute duty is imposed on the manager: cf. s. 49 of the Act of 1887. He is under a duty to "carry out" what the shot-firer must do and if the shot-firer does not do his duty the manager is liable, though if he fulfils the conditions of s. 90 and s. 102, sub-s. 3, of the Act of 1911 he is deemed to have committed no offence. As to carrying out a statutory duty, see *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (8).

As for common employment, the manager was not in that relationship with the appellant workman. His default was not one of a man in common employment with him carrying out a common task. The doctrine, therefore, has no application to his case. The nearest analogous case one could imagine would be that of injury to a company's servant by a director's motor-car driven by his chauffeur. See also *Howells* v. *Landore Siemens Steel Co. Ld.* (9) and *Colman* v. *Isaac Croft & Sons* (10). But no real light is thrown on the problem by the authorities.

Paull, *K.C.*, *Hylton-Foster*, *K.C.*, and *R. Marven Everett* for the respondent board. The questions in this case are as follows: (*a*) Is the duty set forth in the first sentence of art. 2 (*e*) of the Order of 1934 and the last sentence of art. 2 (*h*) a duty which is imposed on the mine-owners? (If the answer is "yes" the mine-owners must fail.) (*b*) If the answer is "no", is it open to the injured workman to allege that there is any other duty applicable to this case imposed by the regulations on the mine-owners? Is there a duty to enforce or carry out their provisions? Was there a breach of such a duty? The workman's argument must amount to asserting that the mine-owners are liable for every breach of a statutory duty by a workman while carrying out his duties for his employers. By the words "so far as is "reasonably practicable" in s. 49 of the Act of 1887 definite duties were not imposed. But under the Act of 1911 and the relevant regulations specific duties are made incumbent on

(8) [1940] A. C. 152.
(9) (1874) L. R. 10 Q. B. 62.
(10) [1947] K. B. 95.

specific individuals and there is in general no obligation on the mine-owners unless they are specifically referred to. Thus the mine-owners are expressly referred to in reg. 117 of the General Regulations, 1913 (Part III dealing with electricity). If in order to impose an absolute liability on the mine-owners it was necessary to mention them there, the fact that there was no corresponding mention of them in the Order of 1934 indicates that that Order did not impose a general absolute liability on them. Since they were not mentioned there, it cannot have been intended to impose an absolute liability on them.

There may be some cases (see *Groves* v. *Lord Wimborne* (11) and *Lochgelly Iron and Steel Co. Ld.* v. *M'Mullan* (12)) when certain duties may be imposed on the mine-owners, though the language is impersonal. When the language is impersonal the substance may show that the employer is aimed at, but where a particular person is named no such liability arises. Each particular regulation must be looked at to see whether or not it imposes a duty on the mine-owners, since it does not necessarily do so. When a duty is specifically laid on a servant and not on his employer, any breach he may commit is not his employer's and his negligence will not travel back to his employer. Criminal liability for a breach of statutory duty imports a civil liability as well, but the existence of the criminal liability under the Act is a reason for not casting on the mine-owners a greater burden than the words compel. Nothing in the Act takes away the common-law duty of the mine-owners and the manager, even when they are not liable for breaches of statutory duty, and at common law they are still liable to see that the mine is properly run. The Act, on the other hand, imposes duties that go beyond their common-law duties.

The breach of statutory duty in the present case was a breach by the shot-firer of the provisions of art. 2 of the Order of 1934, and the duties in that article were imposed expressly and exclusively on the person firing the shot. Therefore the mine-owners could not be made responsible for his breach even if the doctrine of common employment did not apply. Only a duty of care was imposed on them personally, and so there could be no liability for their servant's breach of duty and no question of common employment could arise. Further, the provisions of s. 102, sub-ss. 3 and 8, of the Act of 1911 would, in any event, provide a defence in such an action as this on proof of the facts which

(11) [1898] 2 Q. B. 402, 409–10.

(12) [1934] A. C. 1, 8–10, 21–2.

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would exculpate an owner charged under the penal provisions of the Act. Nor is the manager liable for the shot-firer's default. The words "to the best of their ability enforce" in reg. 1 of the General Regulations, 1913, cannot impose a duty on the manager amounting to an absolute statutory obligation, nor does the regulation impose any duty on the mine-owners.

A breach of a statutory duty involves an act of negligence on the part of the person on whom the duty is cast: see *Riddell* v. *Reid* (13) and *London and North Eastern Ry. Co.* v. *Berriman* (14). If the argument for the workman is right the mine-owners cannot escape civil or criminal liability; nothing can prevent their being prosecuted and convicted for every breach of the regulations since they are bound to observe them and they have not been observed. But if the mine-owners' argument is right they cannot be prosecuted if they have taken all reasonable means to have the regulations observed. One may take, for example, the case of a collier who chooses to conceal a match (not a safety match) in the crutch of his trousers which would not normally be searched. (See Search for Prohibited Articles Order, 1912.) The manager, if he has carried out all his searching duties and has no right to search further cannot be liable civilly for the result of the man's act. Nor can the mine-owners be liable. In such a case if they were prosecuted and convicted, say, for not sufficiently publishing the regulations, they would only be liable for the consequential damage flowing from the failure to publish. [They also referred to *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (15); *Wilsons and Clyde Coal Co. Ld.* v. *English* (16); and *Wilson* v. *Merry & Cunningham* (17).]

Beney, K.C., in reply. *David* v. *Britannic Merthyr Coal Co. Ld.* (18) made it clear that the explosives regulations in r. 12 of s. 49 of the Act of 1887 cast an absolute duty on the mine-owners and it would be surprising if the Act of 1911 removed that duty from them and made it rest solely on the operative. Some duties are expressed personally and others impersonally but prima facie they rest on the mine-owners. One must look at the Order to see on whom any duty rests. The question should be looked at by asking: is this a routine operation which is part of the carrying out of the undertaking? The real test is not: how far can the mine-owners exercise control? In the matter of construction

(13) [1943] A. C. 1, 31.

(14) [1946] A. C. 278, 301, 312–4.

(15) [1941] 1 K. B. 154, 161–2, 164–5.

(16) [1938] A. C. 57, 78.

(17) (1868) L. R. 1 H. L. (Sc.) 326.

there is no real distinction between the words dealt with in *David* v. *Britannic Merthyr Coal Co. Ld.* (18) and the words to be dealt with here. The cases relied on by the mine-owners in this case were cases in which it was assumed that the master was under a statutory obligation and the question was whether he escaped liability by showing that the negligence was that of a fellow-servant of the injured workman. [He referred to the Coal Mines Act, 1911, s. 102, sub-ss. 3 and 8; the Factories Act, 1937, s. 137; *Coltness Iron Co. Ld.* v. *Sharp* (19); *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (20); *Lloyd* v. *Grace, Smith & Co.* (21); and *Poland* v. *John Parr & Sons* (22).]

Paull, K.C. In *Lloyd* v. *Grace, Smith & Co.* (21) there was a duty on the solicitor not to be fraudulent. In *Poland* v. *John Parr & Sons* (22) there was a duty on the master not to commit an assault. But in the present case the statutory duty was never imposed on the mine-owners at all.

Their Lordships took time for consideration.

May 8. LORD PORTER. My Lords, this is an appeal from an order of the Court of Appeal which affirmed a judgment of Jones, J., in favour of the respondents.

The question arising for determination is whether the respondents are liable to pay damages to the appellant in respect of injuries suffered by him on January 27, 1948, while working in their employment. The principal issue raised is whether, upon a true construction of art. 2 (*e*) and (*h*) of the Explosives in Coal Mines Order, 1934, made under s. 61 of the Coal Mines Act, 1911, and of reg. 1 of the General Regulations, 1913, made under s. 86 of that Act, the respondents are responsible for the wrongful firing of a shot in breach of the former Order, whereby the appellant was injured.

The following are the material provisions of the Coal Mines Act, 1911:—

"Explosives." Section 61, sub-s. 1: "The Secretary of "State may, by order of which notice shall be given in such "manner as he may direct, regulate the supply, use, and storage "of any explosives at mines or any class of mines, and may, by "any such order, prohibit the use of any explosive which appears

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(18) [1909] 2 K. B. 146; [1910] A. C. 74.

(19) [1938] A. C. 90.

(20) [1941] 1 K. B. 154, 164.

(21) [1912] A. C. 716, 732–3.

(22) [1927] 1 K. B. 236, 240.

"to him of a kind to be or to be likely to become dangerous in "mines or any class of mines, either absolutely or subject to such "conditions as may be prescribed by the order".

Section 74: "Every person shall observe such directions with "respect to working as may be given to him with a view to "comply with this Part of this Act or the regulations of the mine "or with a view to safety".

Section 75, which, like the provisions previously set out, is contained in Pt. II of the Act ("Provisions as to Safety"), provides: "Any person who contravenes or does not comply with "any of the provisions of this Part of this Act shall be guilty of "an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this "Part of this Act by any person whomsoever, the owner, agent, "and manager of the mine shall each be guilty of an offence "against this Act, unless he proves that he had taken all "reasonable means by publishing and to the best of his power "enforcing those provisions to prevent that contravention or "non-compliance".

"General Regulations." Section 86, sub-s. 1: "The Secretary of State may by order make such general regulations for "the conduct and guidance of the persons acting in the management of mines or employed in or about mines as may appear "best calculated to prevent dangerous accidents and to provide "for the safety, health, convenience, and proper discipline of the "persons employed in or about mines, and for the care and "treatment of horses and other animals used therein, and any "such regulations may vary or amend any of the provisions "contained in Pt. II of, or Sch. III to, this Act".

"Regulations applicable to mines." Section 89, sub-s. 1: "The general regulations applicable to a mine, as supplemented "or modified by the special regulations, if any, for the time "being in force with respect to the mine shall be the regulations "of the mine".

"Penalty for breach of regulations". Section 90: "If any "person who is bound to observe the regulations of any mine, "acts in contravention of or fails to comply with any of them, "he shall be guilty of an offence against this Act, and also the "owner, agent, and manager of such mine shall each be guilty "of an offence against this Act, unless he proves that he had "taken all reasonable means, by publishing and to the best of his "power enforcing the regulations, to prevent such contravention "or non-compliance".

The following are the material paragraphs of the General Regulations, 1913, and the Explosives in Coal Mines Order, 1934:—

General Regulations, 1913: Part I—General. "1. It shall "be the duty of the manager and under-manager to carry out "and to the best of their ability enforce the provisions of every "Order in force under the Act regulating the supply, use and "storage of explosives, and it shall be the duty of all persons "employed in or about the mine to comply with the provisions "of the said Orders".

Explosives in Coal Mines Order, 1934: Part I—General Provisions. "2 (*e*). The person firing the shot shall, before "doing so, see that all persons in the vicinity have taken "proper shelter, and he shall also take suitable steps to prevent "any person approaching the shot. . . . (*h*) Where shots "are fired electrically they shall only be fired by a person "authorized in writing by the manager for the purpose. The "authorized person shall not use, for the purpose of firing, a "cable which is less than twenty yards in length. He shall himself couple up the cable to the fuse or detonator wires and shall "do so before coupling the cable to the firing apparatus. He "shall take care to prevent the cable coming into contact with "any power or lighting cables. He shall also himself couple the "cable to the firing apparatus. Before doing so, he shall see "that all persons in the vicinity have taken proper shelter".

Part II—Special Provisions. "6. In all cases in which permitted explosives are required by this Order to be used:— "(*a*) Competent persons (in this Order called shot-firers) shall be "appointed in writing by the manager for the purpose of firing "shots, and no shot shall be fired except by a shot-firer . . .".

Since the appellant could not succeed in an action for common-law negligence it was incumbent on him to show that the duty, the breach of which is relied upon, was imposed on his employers or, at any rate, on someone who was not his fellow workman. To establish this right he put forward two alternative propositions: (1.) that the duty lay on the employers themselves; (2.) that it was imposed on the manager and that the manager was not a fellow workman.

Apart from authority there is something to be said for the second contention, but *Wilson* v. *Merry & Cunningham* (23), *Hedley* v. *Pinkney & Sons Steamship Co. Ld.* (24), and *The Napier Star* (25), are authorities to the contrary and in my opinion your Lordships' House should not now depart from the principles there laid down. This statement may, indeed, be subject to some qualification. The manager may not in all cases be a fellow workman, e.g., when appointing a shot-firer or in cases in which he acts as the alter ego of the employer. But where the alleged breach of duty is that of a subordinate to whom the manager is assumed to have delegated the performance imposed on him (e.g., the shot-firer whom he has appointed) he is the fellow servant of that shot-firer inasmuch as each is engaged in performing directly or by delegation the same task.

Quite apart from the defence of common employment, however, the further question has to be considered what duty in this matter is in fact laid upon the manager. This problem is not the same as that which involves the liability imputed to an owner, upon whom it is said the duty is imposed because he is the owner and not by any general provision of the Act or regulations. No general duty, however, is suggested to exist on the part of the manager by reason of his position as manager. In individual cases the regulations do lay a specific obligation upon him, but the only general provision as to his liability is that contained in reg. 1 of the General Regulations of 1913, viz., " to carry out " and to the best of [his] ability enforce " the regulations. With these words may be contrasted the obligation contained in the same regulations upon all other persons employed to *comply* with them and the provisions of reg. 117 which has reference solely to the electricity portion of the regulations, viz.: " It shall be " the duty of the mine owner, agent, and manager to *comply* with " and enforce the following regulations, and it shall be the duty " of all workmen and persons employed to conduct their work in " accordance with the regulations ".

Even in the case of regulations I cannot bring myself to believe that the three expressions " carry out ", " to the best of their " ability enforce ", and " comply with " have the same meaning, more particularly when they all appear in one short paragraph. In reg. 1 the manager and under-manager are not enjoined to comply with but only to carry out and to the best of their ability enforce. If this were, as the appellant suggested, a double obligation in the sense that liability attaches unless both limbs of the requirement are enforced, then the second part, viz., "to "the best of their ability to enforce", is otiose. The manager is in fault if he has not carried them out and it is no excuse to say that he has done his best and meaningless to say he shall do so. If, on the other hand, the true meaning is that he has to carry out those imposed on him and do his best to enforce those imposed on others the whole matter falls into place and every portion of the regulation receives an appropriate meaning. Upon the learned judge's finding, the manager was not in fault. He had done his best and therefore, even if he was not a fellow servant of the appellant, he had not failed to enforce the regulations to the best of his ability.

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(23) (1868) L. R. 1 H. L. (Sc.) 326.

(24) [1894] A. C. 222.

(25) [1939] P. 330.

The question whether the duty which is laid upon the shot-firer is one for the carrying out of which the owner is personally liable or whether he has some lesser responsibility is a difficult and contentious matter. There is a considerable body of authority on the question which must be considered in its place, but ultimately the decision rests upon the true construction of the Act and regulations and I think it of assistance to consider first at what conclusion I should have arrived in the absence of authority.

Before, however, one analyses the relevant wording it is necessary to consider the proper approach to the matter. It was suggested on behalf of the respondents that the Coal Mines Act, 1911, is a measure imposing criminal liability and therefore should be interpreted as throwing no greater burden on the employer than its words compel. It has, however, to be remembered that this Act is also a remedial measure passed for the protection of the workman and must, therefore, be read so as to effect its object so far as the wording fairly and reasonably permits.

This, in my opinion, is the view expressed by Lord Warrington in *Lochgelly Iron & Coal Co. Ld.* v. *M'Mullan* (26), where he says: " Section 49 of the Coal Mines Act, 1911, is in the following "terms:—' The roof and sides of every travelling road and "' working place shall be made secure, and a person shall not, "' unless appointed for the purpose of exploring or repairing, "' travel on or work in any travelling road or working place "' which is not so made secure '. This involves, it will be noted, " an absolute obligation on the owner to make secure the roof and " sides referred to, and a further obligation that no person shall " work in a travelling road or working place which is not so made

(26) [1934] A. C. 1, 13.

"secure. As to the law on the subject of the liability of owners "for breach of obligations imposed by statute for the protection "of those employed by them, I think the following propositions "are supported by authority:—(1.) If the obligation is to do or "abstain from doing a particular thing and on the construction "of the statute the obligation is created for the protection of a "particular class, e.g., workers in a mine or factory, then a "member of that class injured by the non-performance of the "obligation is entitled to sue the owner in an ordinary action "founded on personal negligence. (2.) The fact that the obligation has not been performed is in itself evidence of personal "negligence on the part of the owner. (3.) That the owner "cannot relieve himself of his obligation by saying that he has "appointed reasonably competent persons and that the breach "is due to negligence on their part, nor was it open to him "at common law to plead common employment. (4.) There "appears to be no material difference in this respect between the "law of England and that of Scotland. In the present case I "have no doubt that the obligation in question was imposed for "the protection of the particular class. Neither have I any doubt "that it is imposed as a personal obligation on the owner not "capable of delegation".

It will be observed that Lord Warrington ends by saying that he has no doubt that s. 49 of the Act of 1911 imposes a personal obligation upon the owner to make the roof secure. Such a conclusion is warranted by a consideration of the substance of the duty imposed in that case, but it does not follow that all the other duties prescribed by the Act are also laid upon the owner himself. The relevant provisions of the Explosives in Coal Mines Order, 1934, differ in that in terms they impose an obligation on the shot-firer and on him alone.

It was at first contended on behalf of the respondents that no obligation under either Act or regulations rested upon the owner unless he was specifically referred to. Having regard, however, to the decision in *Groves* v. *Lord Wimborne* (27) and *Lochgelly Iron & Coal Co. Ld.* v. *M'Mullan* (28), it was conceded that there were certain duties which devolved upon the employer though the language used was in impersonal form. The submission was then modified to the extent that where impersonal language was used the substance of the sections of the Act or of the regulations might show that the employer was aimed at but that where the duty was specifically imposed on a particular person no such liability arose.

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(27) [1898] 2 Q. B. 402.

(28) [1934] A. C. 1.

In terms no general duty is laid upon the owner to perform or cause to be performed the requirements of the Act and regulations except that contained in a number of sections in similar wording, of which ss. 75 and 90 of the Act are examples. Those sections make any breach of the Act an offence on the part of the owner unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the regulations, to prevent a contravention or non-compliance with them. They are concerned however in terms with criminal offences only and still leave open the question whether the owner has broken the regulations and is therefore liable in damages though he is not criminally responsible.

The regulations are numerous and lack precision. They were intended, I fancy, as a working guide and their exact meaning left to elucidation by a court of law in case any dispute arose. I have, however, read through the whole of them and am not prepared as at present advised to draw a general inference that the owner is not personally liable in a case where the person whose duty it is to carry out the obligation is specifically named. It is not, however, in my opinion, necessary to come to a final conclusion on that matter and I should prefer to pronounce upon it if and when such a decision is essential.

The first two sentences of Pt. I, art. 1 (*a*), of the Explosives in Coal Mines Order, 1934, in themselves show the difficulty of so distinguishing the persons upon whom the duty is imposed. Is the owner under a duty to provide a suitable place for storage of explosives above ground, but under no duty to see that no explosive substance is stored underground because that duty is expressly imposed on the manager and not on him? The true view is, I think, that each regulation must be considered on its own merits and judgment given accordingly. Counsel for the appellant was inclined to concede this reasoning up to a point but said that prima facie the owner would be liable unless the wording or substance of the regulation freed him from liability. As an example he instanced the taking by a workman of a match or matches concealed on his person into a mine. Such an obligation, he said, could not readily be supposed to have been imposed on the owner, inasmuch as only a limited right of search was permitted and an owner could not be expected to do the impossible.

The concession may well be justified in a case where it is almost impossible for the owner or manager to prevent the breach, but having regard to the duties imposed on a shot-firer which he alone can carry out, with which even a manager is not allowed to interfere and which, moreover, it would be difficult if not impossible to oversee, the same argument is equally applicable in the case of shot-firing. One has only to look through the duties placed upon shot-firers, e.g., paras. 6 and 6 (*a*) of the Explosives in Coal Mines Order, 1934, to see how personal the obligations imposed are. The same observations are true of the General Regulations made on July 10, 1913. Even if it be true that the regulations as a whole prima facie bind the owner there are grounds on which it can be said in many cases that the owner as owner is not affected. Instances may be found in regs. 9, 10 and 12 of the General Regulations which no owner or manager could carry out or enforce.

I have given these examples and they could be amplified but the case of the shot-firer is perhaps as good as any. The manager and no one else must appoint him. He alone can fire the shot and the minutiae of his task are such that no oversight which is practicable could ensure their performance. The regulations material to this case, viz., those of 1934, art. 2 (*e*) and (*h*), are imposed on the shot-firer personally and in their essence are capable of being carried out by him alone. With these provisions may be contrasted Pt. III, art. 11, which states:—" A ' permitted " ' explosive ' shall comply in every respect with the prescribed " definition, and any explosive that does not so comply shall not " be deemed to be a permitted explosive: Provided that an " owner, agent, or manager shall not be responsible for such " non-compliance if he shows that he has in good faith purchased " an explosive marked on the packages and the cartridges as a " permitted explosive, and that he has taken all reasonable means " to prevent deterioration of the explosive while stored . . .".

There the duty to use only permitted explosives is imposed generally, nevertheless the owner, agent or manager are obviously intended to be made liable, since if they were not it would be unnecessary to provide an excuse.

My conclusion, therefore, apart from authority, would be that there is no universal rule making the owner liable civilly for the non-fulfilment of the regulations. Unless he is specially charged or excused, his liability or non-liability must depend upon a careful analysis of the particular regulation which has been broken. I am fortified in this view by considerations similar to those which are applicable to the case of a manager. If the owner is always liable I can see no reason for placing a specific liability on him in certain cases and not in others, e.g., in reg. 117 an absolute obligation upon the owner is imposed by it in terms. If that obligation already existed in all cases I can see no reason for a further and unnecessary reiteration of a duty by which he was already bound.

These considerations bring me to an analysis of the more important cases in which the subject has been discussed. If *David* v. *Britannic Merthyr Coal Co. Ld.* (29) had not been appealed to your Lordships' House I should have experienced great difficulty in distinguishing the principle on which its main point was decided from this case. Fletcher Moulton, L.J. (30), at any rate, says in terms that the owner is liable for any breach by any of his employees unless that employee is acting outside the scope of his duty. Buckley, L.J. (31), on the other hand, thinks him liable if he does not prove that he took all reasonable means to prevent the breach. The case was sent back for a new trial, which is consistent only with the latter view. Your Lordships' House (32) dismissed the appeal but dissented from many of the reasons for judgment without specifying those they rejected. But, again, an order sending the case to be retried is consistent only with the view that the owner's responsibility was not absolute but could be discharged if he showed that he had done his best to enforce the regulations. If he was absolutely liable judgment should have been given in the plaintiff's favour. Lord Haldane, in *Watkins* v. *Naval Colliery Co.* (1897) *Ld.* (33), explains the order for a new trial on the ground that that was all that was asked. I have examined the record in your Lordships' House and think that probably that was the only remedy asked for in the House of Lords though, as Tucker, L.J., points out (34), both grounds were relied upon in the Court of Appeal.

I think, however, that the grounds of the decision in *David's* case (35) are to be found elsewhere and emerge in the speech of Lord Kinnear in *Black* v. *Fife Coal Co. Ld.* (36), where he points out that the obligations referred to in s. 49 of the Act of 1887 which was then in force are prefaced by the statement:—" The

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(29) [1909] 2 K. B. 146.
(30) Ibid. 162–3.
(31) Ibid. 168.
(32) [1910] A. C. 74.
(33) [1912] A. C. 693, 703.
(34) [1950] 1 K. B. 466, 475.
(35) [1909] 2 K. B. 146; [1910] A. C. 74.
(36) [1912] A. C. 149, 160.

"following general rules shall be observed, so far as reasonably "practicable", and that from that general requirement is to be inferred a duty on the part of the owner to see that the regulations are so obeyed. It does not make him personally liable in all cases, and accordingly in cases where no personal duty is cast on the owner he would escape all liability were it not for the provisions of s. 50 which make him responsible for the negligence of his employees. That section, however, does not impose a general liability if the rules are not carried out, only an obligation to use due care and diligence to see that they are obeyed. The onus, however, was on the owners to show that they had been diligent. If they did so they would have performed their obligations under the Act but, if they could not do so, they would be liable. The case, therefore, was rightly sent back in order that it might be ascertained whether they had fulfilled that duty or not.

But, though I am not sure that Lord Shaw took the same view, Lord Kinnear held that certain of the rules did not create a personal duty on the owners themselves. He instances (37) the case of a miner who neglects the instructions as to the use of a safety lamp or his possession of lucifer matches in certain parts of the mine. In his view, however, the owners were prima facie liable if they did not use due diligence, because of the general enactment that the rules were to be observed and this meant that they were to be observed by all, owner, agent, manager, and individual workman so far as they applied to him, alike.

In the Act or regulations now under consideration there is no general requirement that they shall be observed: merely a provision either that certain persons shall do certain things or an impersonal requirement that certain things shall be done. No doubt a duty is to be inferred to have been placed in some cases on the owner personally to see that the requirements are complied with, but in others, including the safety provisions contained in Pt. II of the Act with which your Lordships are concerned, the duty in many cases appears to me to be prescribed by the Act itself or regulations themselves and in this case by ss. 74 and 75. Those sections in my opinion impose an obligation, but not an absolute one. Section 75 is primarily concerned with criminal liability and does not specifically place a liability for damages for negligence upon the owner. It is common ground, however, that the existence of criminal liability also imposes a

(37) Ibid. 163.

civil liability for damages for statutory negligence in circumstances which would not apart from its provisions give rise to either criminal or civil liability. In cases where a personal duty is laid upon the owner under other provisions of the Act or regulations the owner may be absolutely bound to answer for the faults of his subordinates, but where such an obligation does not exist he would in my view be under no duty at all either civilly or criminally were it not for the provisions of ss. 74 and 75 or other sections to the like effect. In such a case the liability both civil and criminal is imposed by those sections and by them alone.

In my opinion, therefore, the true meaning of these provisions is that the owner is guilty of a criminal offence and liable also for damages unless he has taken all reasonable means by publishing and to the best of his ability enforcing these provisions. But if he has done his best he is neither guilty of a crime nor in breach of a statutory enactment. His civil and criminal duties are commensurate. In the present case, where the duty is specifically laid upon the shot-firer whom the owner cannot himself appoint and with whose activities he cannot interfere, I cannot see any reason for thinking that the owner has any duty beyond that resulting from the provisions of those sections.

It is to be observed that s. 75 deals only with a breach of the provisions of Pt. II of the Act and does not in terms mention the regulations even though made under a provision contained in s. 62 of that Part. I am inclined to agree with Lord du Parcq, then du Parcq, L.J., when he says in *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (38) that reg. 117 of the General Regulations must be read as part of the Act and thereby, as I think, takes the view that regulations made under the Act must be so read, but whatever may be its truth I think any possible gap is filled up by the provisions in the earlier section. "Such "directions" in s. 74 cannot, I think, be confined to some specific direction given to the workman concerned over and above general directions given to him as a member of a class. Under them, in my opinion, are to be included the directions contained in the Explosives in Coal Mines Order, 1934. Nor do I think that they are confined to ensure compliance with Pt. II of the Act or, indeed, with the regulations of the mine, however that phrase may be interpreted, since the section also contains the words "or "with a view to safety". Such an expression contained in that

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(38) [1941] 1 K. B. 154, 165.

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context appears to me to impose the widest obligation upon the owner who has not done his best to enforce the duties laid upon his employees. I have accordingly purposely refrained from expressing an opinion as to whether, when s. 90 refers to the general and special regulations, it refers to those contained in the Explosives in Coal Mines Order, 1934, or whether that section only refers to the General Regulations made under s. 85 of the Act and such special regulations as apply to a particular mine only.

In my opinion the decision of your Lordships' House in *Riddell* v. *Reid* (39) is not in any way inconsistent with this view. That decision turned upon the terms of s. 137, sub-s. 1, of the Factories Act, 1937, under which there could be no question but that a personal duty was placed upon the owner. The Building Regulations, 1926, the construction of which was in question, in terms imposed such an obligation. They are introduced by the words " It shall be the duty of every contractor and employer of " workmen to observe such of the requirements in Pt. I of these " regulations as affect any workman engaged by him ", and Pt. I is headed " Duties of Employers ". Plainly therefore they cast upon employers themselves the burden of fulfilling them. The only matter in dispute was whether he was excused under the terms of s. 137, sub-s. 1, of the Act. That section, however, imposed no obligation. It was aimed not at lessening the duties of the owner but at excusing him from certain sanctions if he failed to carry them out: admittedly it freed him from any criminal offence in certain events and the only dispute was whether it also excused him from liability to pay damages in a civil action. It was held that it did not. Such a decision, however, has nothing to do with the question whether the Act put the task of fulfilling the requirements of the Building Acts and Regulations upon him personally. It assumed that there was a personal liability and decided that if he took all reasonable steps to prevent the infraction it freed him from criminal liability but did not affect his civil responsibility.

The attempt to find an escape from civil liability in the wording of that section would have its counterpart in a suggestion that in the present case s. 102, sub-s. 3, of the Act (which also is confined to excusing a criminal liability for a recognized breach) would be a defence to a civil action. A contrary view was held by your Lordships in *London & North Eastern Railway Co.* v. *Berriman* (40), and no similar contention was put forward

(39) [1943] A. C. 1.

(40) [1946] A. C. 278.

in the present case. Section 102, sub-s. 8, was neither pleaded nor relied upon and therefore it is unnecessary for your Lordships to decide the extent of the protection it affords.

Of the other cases cited, *Wilsons & Clyde Coal Co. Ld.* v. *English* (41) is an authority in respect of the obligation of a master to provide a safe system of working and is not germane to the matters now in issue. *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (42) dealt with a breach of a different set of regulations, viz., regs. 131 and 132 of the General Regulations, 1913. In that case a specific obligation was laid on the owner personally by reg. 117, which says: "It shall be the duty of the mine-owner ". . . to comply with and enforce the following regulations . . .", and regs. 131 and 132 form part of the regulations referred to. No question, therefore, could arise as to whether a personal duty was laid on the owner or not; the regulations themselves specifically imposed it. Moreover, as I read the judgment of du Parcq, L.J., in that case, he recognizes that certain of the obligations in the regulations are not so imposed, though those to which reg. 117 refers are not included amongst them. I should agree with this view and not with that of MacKinnon, L.J., who appears to hold that all the duties which the regulations prescribe are a direct obligation of the owners.

Finally, *Lochgelly Iron & Coal Co. Ld.* v. *M'Mullan* (43) is an example of that class of personal duty which a regulation imposes on the owner by reason of the substance it contains. As Lord Wright said (44): "The provisions of s. 49 . . . clearly "belong to the class which impose a duty on the employer to "take certain precautions for the protection of his workmen; it "is absolute in its terms, save as modified by the later s. 102, "sub-s. 8", but that is a matter of defence and does not come in at this stage. The obligation in question was that of making the roof secure and ran: "The roof . . . of every . . . working "place shall be made secure, and a person shall not . . . work "in any . . . working place which is not so made secure". The form is impersonal but the substance such as would naturally place an obligation on the owner.

The general effect of these considerations in my opinion warrants the conclusion that the Act and regulations create two sets of duties, one placed on the owner personally; the other upon his employees. The first may exist either by direct enactment or be derived from the substance of the relevant section or

(41) [1938] A. C. 57.
(42) [1941] 1 K. B. 154.
(43) [1934] A. C. 1.
(44) Ibid. 22.

regulation. Where, however, neither of these circumstances exists the only obligation of the owner is to be found in sections such as s. 75 which impose a qualified duty upon the owner, making him responsible both civilly and criminally unless he has used due care. In the present case the learned judge has found that all due care was exercised, and as I think that no personal liability was imposed directly on the owner he is not in my view responsible for the omissions of the shot-firer and the consequent injury to the appellant.

Having regard to the opinion which I entertain, the further argument on behalf of the respondent that, as no duty is imposed upon the owner personally, or at any rate only a duty of care, no liability rests upon the employer for a breach of statutory duty by his servant and, therefore, no question of common employment arises, does not require a solution. All I need say at this juncture is that I must not be taken to accept it and though I express no final opinion, I have read at least with sympathy the observations upon it contained in the speech of Lord MacDermott.

My Lords, I am conscious that the wording of the Act and regulations is difficult and obscure, and I am by no means sure that the recorded cases speak with one voice; nevertheless, I am of opinion, for the reasons I have given, that the Court of Appeal were right and I would dismiss the appeal with costs.

LORD NORMAND. My Lords, I agree with my noble and learned friend on the woolsack.

The sole foundation of this appeal is breach of arts. 2 (*e*) and 2 (*h*) of the Explosives in Coal Mines Order, 1934, made under s. 61 of the Coal Mines Act, 1911, in respect of failure to see that the appellant had taken proper shelter before the shot was fired and failure to see that he had taken proper shelter before the cable was coupled to the firing apparatus. The appellant cannot succeed unless he shows that the breach was a breach of duty directly laid on the respondents, as the mine-owners, by the regulations. If that duty was by the regulations directly laid on Spence, the authorized person who fired the shot, and on him alone, the respondents can rely on the defence of common employment. That defence is no less available to them if, on a sound construction of reg. 1 of the General Regulations, 1913, made under s. 86 of the same Act, the duty was laid directly on the manager and under-manager, for in my opinion these officials, though of higher grade than the shot-firer, must also be regarded in a case like the present as fellow servants of the appellant (*Wilson* v. *Merry & Cunningham* (45), *Hedley* v. *Pinkney & Sons Steamship Co. Ld.* (46), *The Napier Star* (47).)

My Lords, there is, I think, support in the books for the view that all regulations made for the safety of employees in factories or coal mines under the relevant Acts should be construed if possible as imposing a direct obligation on the occupier of the factory or on the owner of the mine. *Groves* v. *Lord Wimborne* (48) supports this view as far as the Factory Acts are concerned, and so far as the Acts providing for safety in mines are concerned the judgments of Fletcher Moulton, L.J., in *David* v. *Britannic Merthyr Coal Co. Ld.* (49), of MacKinnon, L.J., in *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (50), and of Lord Warrington of Clyffe in *Lochgelly Iron and Coal Co. Ld.* v. *M'Mullan* (51) were all influenced by it. The underlying reason is that, unless a regulation imposed a direct obligation on the employer, the workman injured by its breach was without the full protection of a remedy against his employer, while the defence of common employment subsisted. Even under the amendment of the law brought about by s. 1 of the Law Reform (Personal Injuries) Act, 1948, it may be that there are cases in which the workman is still without this full protection if his injury is caused solely by a breach of a regulation committed by another workman, unless the duty to comply with the regulation is directly laid on the employer. On this question, however, I do not find it necessary to express an opinion.

The appellant relied rather on the considerations to which I have adverted than on the universal proposition that every regulation for the safety of miners made under the Coal Mines Act, 1911, must be deemed to impose a duty on the mine-owner directly. If the universal proposition had been put forward it would have been found impossible to reconcile with ss. 75 and 90 of the Act, both of which distinguish between persons who are bound to observe a regulation and other persons, including the mine-owner, who have a duty under these sections to take all reasonable means of publishing and to the best of their powers enforcing the regulation to prevent a contravention. The universal proposition is also inconsistent with the provisions of regs. 1 and 117 of the General Regulations, 1913, which, in my opinion, should be read together as connected and related enactments, though they do not have the same provenance, and as if they were provisions of the statute under which they are made. Regulation 1 imposes on the manager and under-manager a duty "to carry out and to the best of their ability enforce the "provisions of every Order in force under the Act regulating the "supply, use and storage of explosives". Regulation 117 imposes on the mine-owner, agent and manager a duty "to "comply with and enforce" the regulations dealing with electricity. If every regulation imposed a duty directly on the mine-owner, there was no need to mention him in reg. 117, but if some regulations do not impose a duty directly on the mine-owner the omission of the mine-owner in reg. 1 and his inclusion in reg. 117 is intelligible.

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(45) (1868) L. R. 1 H. L. (Sc.) 326.

(46) [1894] A. C. 222.

(47) [1939] P. 330.

(48) [1898] 2 Q. B. 402.

(49) [1909] 2 K. B. 146.

(50) [1941] 1 K. B. 154.

(51) [1934] A. C. 1.

On the narrower proposition maintained by the appellant my conclusions may be stated in three heads. First assuming a presumption in favour of a direct obligation on the mine-owner, I think that it is rebutted by the terms of the regulations infringed in this case. Second, the terms of the Act and of the regulations thereunder are difficult to reconcile with the presumption. Third, the decided cases do not establish the presumption.

First, then, art. 2 (*e*) prescribes three precautions which "the "person firing the shot" shall take: (1.) that before firing the shot he shall "see that all persons in the vicinity have taken "proper shelter, and he shall also take suitable steps to prevent "any person approaching the shot"; (2.) that "he shall also "himself take proper shelter"; and (3.) that "if he has reason "to believe that there is a possibility of the shot blowing through "into an adjoining place he shall send verbal warning to the "persons in that adjoining place to take proper shelter". These duties are in a peculiar degree duties appropriate only to the person firing the shot, and the express terms by which they are imposed are not apt to impose a duty on the mine-owner. If there is a presumption such as is suggested, it is displaced by the express terms of the regulation. On the contrary assumption the person firing the shot and failing to take proper shelter could complain of the mine-owners' breach of duty, a result which I think could be achieved only by express enactment or by necessary implication arising from some other provision of the Act or regulations. The same is true of the other two duties, the first of which is contingent on the readiness and intention of the shot-firer to fire the shot, and the last on his reasonable belief that there is a possibility of the shot blowing through into an adjoining place. Both these contingencies are personal to the person firing the shot, and if it had been intended that the duty should be artificially imposed on the mine-owner, express words would surely have been used to make the intention effective. The duty expressly imposed on the authorized persons by art. 2 (*h*) of seeing that all persons in the vicinity have taken proper shelter before he couples the cable to the firing apparatus, is expressly laid on the authorized person and on him alone, and it is a duty personal to him; any presumption that the duty is also directly imposed on the owner, would, in my opinion, be displaced.

Next, a presumption that the obligations imposed by the Act and the regulations are laid directly on the owners would not be in harmony with the provisions of s. 2 of the Act by which the mine-owner is forbidden to take any part in the technical management of the mine unless he has special qualifications, and is bound to appoint a manager who shall be responsible for the control, management and direction of the mine. There is, it may here be noted, no corresponding provision in the Factory Acts. It is also apparent that the provisions of the Act and of the regulations purport to impose particular duties on particular persons. Sometimes the duty is laid upon the subordinate workmen, sometimes on those with " responsible duties ", sometimes on the manager and under-manager, sometimes on the owner, agent and manager, sometimes on the owner. Where the regulation is impersonally expressed, as often happens, the person or persons on whom the duty rests can be discovered only by construction, and in my opinion the sound rule is to consider each regulation, taking into account not only the terms in which it is expressed, but also the character of the duty which it creates, and the relation of the regulation to any provision of the Act and of other regulations which may throw some light on it, and so to ascertain (without recourse to presumption) the persons on whom the duty is imposed.

Lastly, the cases on which the appellant relied do not in my opinion support the supposed presumption. In *Groves* v. *Lord Wimborne* (52) there had been a breach of duty under the Factory and Workshop Act, 1875, in allowing dangerous machinery to remain unfenced. The questions were whether the duty was an absolute duty and one imposed directly on the occupier of the factory, and whether the occupier was civilly liable to an employee

(52) [1898] 2 Q. B. 402.

injured as a consequence of the breach. The duty to fence dangerous machinery was expressed impersonally in s. 6, sub-ss. 2 and 4. It is a duty, like most of the duties under the Act, which falls within the province of the occupier of the factory and one which without his authority and action could not be performed. These sub-sections were construed as imposing a direct and absolute duty on the occupier, who was therefore responsible for injury caused by the breach, though the fencing had been removed by the negligent act of the plaintiff's fellow servant. *Riddell* v. *Reid* (53) is a case of the same kind and carries the appellant no further. These cases do not, in my opinion, help the appellant. He relied on *David* v. *Britannic Merthyr Coal Co. Ld.* (54). In that case it was held by the Court of Appeal that the rules referring to shot-firing in s. 49 of the Coal Mines Regulation Act, 1887, imposed a duty on the mine-owner. Fletcher Moulton, L.J., arrived at this conclusion on a consideration of s. 49 and the rules themselves, and he held that the duty was absolute. That was not the view taken in this House, which ordered a new trial, with a direction that the onus was upon the owner of the mine to prove that the authorities of the mine had taken proper care of the safety of the miners. No evidence of this kind would have been competent if an absolute duty was directly imposed on the mine-owner.

Yelland v. *Powell Duffryn Associated Collieries Ld.* (55) is more germane to the present case. In it there had been a breach of regs. 131 (*e*) and 132 (iii) of the General Regulations made under s. 86 of the Coal Mines Act, 1911. These regulations require that if there is a fault in an electric circuit the part affected shall be made dead and remain so till the fault has been remedied. It was held that the regulations, which are impersonally expressed, impose a direct and absolute obligation on the mine-owner. The appellant specially referred to the judgment of du Parcq, L.J. He relied on reg. 117, which provides inter alia that: "It shall be the duty of the mine-owner, agent, and "manager to comply with and enforce the following regulations", which include regs. 131 and 132, and he held that the mine-owner was bound to comply with reg. 131 (*e*). I find it difficult to accept this construction of reg. 117 and, though it is not necessary to decide the point, it may be thought a sounder construction to read the words "to comply with" and "to enforce"

(53) [1943] A. C. 1.

(54) [1909] 2 K. B. 146; [1910] A. C. 74.

(55) [1941] 1 K. B. 154.

distributively, so that the mine-owner, agent, and manager are bound to comply with those regulations which lay duties upon them respectively and to enforce according to their functions and their spheres of duty the duties which are laid on other persons such as the electricians or the subordinate employees. But in any case the regulations infringed in the present case are affected not by reg. 117 but by reg. 1, and that regulation lays on the manager and under-manager the duty "to carry out and "to the best of their ability enforce the provisions of every order "in force under the Act regulating the supply, use and storage of "explosives", but it lays no duty on the owners. Since the respondents did not found on s. 90 and had not pleaded s. 102, sub-s. 8, of the Act it is not necessary to refer to the observations of du Parcq, L.J., upon them. I desire, however, to say that in my opinion proof of facts sufficient under s. 90 to prevent conviction of an offence does not constitute a defence in civil proceedings for damages. I have in *Crane* v. *William Baird & Co. Ld.* (56) expressed an opinion on the meaning and effect of s. 102, sub-s. 8, which agrees with the opinion of du Parcq, L.J. In *Yelland's* case (57) MacKinnon, L.J., took the view that *Groves* v. *Lord Wimborne* (58) established a prima facie rule that all regulations for the safety of employees impose a duty directly upon the employer. I must respectfully say that it is extremely hazardous to apply judicial observations upon regulations made under the Factory Acts to regulations made under the Coal Mines Act, 1911, that *Groves* v. *Lord Wimborne* (58) does not warrant the broad proposition which the learned Lord Justice deduced from it, and that *Yelland's* case (59) may call for further consideration hereafter.

In *Lochgelly Iron & Coal Co. Ld.* v. *M'Mullan* (60) it was decided that the obligation to make secure the roof of travelling roads in mines (s. 49 of the Act) was laid upon the owner and that negligence in maintaining the roof was "personal negligence" of the owner, but with the exception of Lord Warrington of Clyffe the noble and learned Lords decided the case on the terms of the section and the character of the duty to be performed. Lord Wright said (61): "The provisions of s. 49 of the Coal Mines "Act clearly belong to the class which impose a duty on the "employer to take certain precautions for the protection of his

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(56) 1935 S. C. 715.
(57) [1941] 1 K. B. 154.
(58) [1898] 2 K. B. 402.
(59) [1941] 1 K. B. 154.
(60) [1934] A. C. 1.
(61) Ibid. 22.

"workmen". Lord Atkin similarly said (62): "It is further "beyond question that these provisions" (i.e., the provisions of s. 49) "impose a special duty upon the employer towards those "for whose safety they are designed". One of the cases referred to by Lord Atkin is *Black* v. *Fife Coal Co. Ld.* (63). In that case Lord Kinnear, in a powerfully reasoned judgment, drew a distinction between the rules which by their nature directly affected the mine-owner, such as those providing for the safety of roads and roofs, and the rules which did not directly affect the mine-owner, such as those prohibiting the taking of lucifer matches into the mine. The distinction is a real one, and in the Act of 1911 and the regulations under it the distinction is preserved.

I am of opinion that the Court of Appeal rightly held that the regulations infringed in the present case by their explicit terms and by the nature of the duty imposed belong to the class of regulations which do not directly affect the mine-owner.

I would therefore dismiss the appeal.

LORD OAKSEY. My Lords, I have had the advantage of reading in print the opinions which have just been delivered and the opinion of my noble and learned friend Lord MacDermott, which is about to be read, and I agree with them.

LORD MACDERMOTT. My Lords, on January 27, 1948, the appellant sustained personal injuries in the course of his employment by the respondents at their North Gawber Colliery as a stone contractor and coal face worker. His injuries were caused by one Joseph Spence, the authorized shot-firer for the part of the mine where the accident occurred, who fired a shot, by means of electrically operated apparatus, near to where the appellant was working and before he had taken proper shelter. It was conceded that in so doing Spence had acted negligently and also in breach of a statutory duty imposed upon him by paras. (*e*) and (*h*) of art. 2 of the Explosives in Coal Mines Order, 1934, an Order which regulates the supply, use and storage of explosives at mines and was made (in so far as material) under the powers conferred by s. 61 of the Coal Mines Act, 1911. I must refer to the wording of paras. (*e*) and (*h*) in more detail later, but for the moment it will suffice to say that both contain a clear direction to the shot-firer to see, before firing the shot, that all persons in

(62) Ibid. 8.

(63) [1912] A. C. 149.

the vicinity have taken proper shelter. It was also conceded—necessarily as it seems to me on the authorities—that the appellant had a right to sue in tort for damages occasioned by a breach of this statutory duty subject, of course, to such defences as might be open to those sued.

The appellant was injured before the defence of common employment was abolished by the Law Reform (Personal Injuries) Act, 1948. The respondents were therefore entitled to rely upon that defence, and they did so. It was, indeed, their main answer to the appellant's claim, and I will turn to the issues it raises at once.

It was not disputed that Spence and the appellant were in common employment or that, had the only fault attributable to Spence in regard to what he did been one of common-law negligence, the defence of common employment would have succeeded. What was in dispute was whether the statutory duty to which I have referred rested exclusively upon the shot-firer, as the respondents contended, or whether, as the appellant submitted, it rested not only on the shot-firer but also directly and as a personal obligation upon the respondents as owners of the mine. If the former, the defence of common employment would be effectual to defeat the claim on the view that the doctrine of common employment covered risks arising from the breach of such a statutory duty by a fellow servant no less than from some act of casual negligence on his part. This was the view taken by Tucker, L.J., in the Court of Appeal (64), and by du Parcq, L.J., in *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (65). It was not challenged before your Lordships and is, I think, clearly right. But if, on the other hand, the appellant's submission is well founded, the doctrine would afford no defence and the respondents would remain liable for the reasons enunciated by this House in *Wilsons & Clyde Coal Co. Ld.* v. *English* (66).

The immediate question, then, is whether paras. (*e*) and (*h*) of art. 2 of the Order of 1934 cast a direct and personal obligation upon the respondents. This, to my mind, is entirely a matter of construction. It goes without saying that the legislature may by the use of appropriate language impose an obligation of this nature upon employers irrespective of personal default or of whether they have the capacity or the means to act for themselves or to regulate or supervise the conduct of their subordinates.

(64) [1950] 1 K. B. 466, 476.

(65) [1941] 1 K. B. 154, 164.

(66) [1938] A. C. 57.

The statute book is not lacking in examples of this sort of enactment and the underlying policy is often discernible. But whether the policy of the legislation is manifest or obscure bears only on the difficulties of interpretation, and the true intention has still to be gathered from the text according to the ordinary canons of construction. The first step, therefore, is to see what the paragraphs in question say. With the omission of certain immaterial words they read thus: "(*e*) The person firing the shot shall, before "doing so, see that all persons in the vicinity have taken proper "shelter, and he shall also take suitable steps to prevent any "person approaching the shot. He shall also himself take proper "shelter. . . . (*h*) Where shots are fired electrically they shall "only be fired by a person authorized in writing by the manager "for the purpose. The authorized person shall not use, for the "purpose of firing, a cable which is less than twenty yards in "length. . . . He shall also himself couple the cable to the firing "apparatus. Before doing so, he shall see that all persons in the "vicinity have taken proper shelter".

In the opinion of the trial judge and of the Court of Appeal these provisions laid the duty which Spence failed to observe upon the shot-firer exclusively and did not involve the respondents in any direct or personal obligation with regard thereto. I respectfully agree. Looking only to the wording of these paragraphs I have difficulty in seeing how the draftsman desiring to place this duty upon the shot-firer alone could well have been more explicit. Does, then, the context in which these paragraphs must be set justify a different conclusion? I do not think so. For this purpose I include in the relevant context the Act of 1911, the Order of 1934 and the General Regulations made under s. 86 of the Act other than reg. 1 which I must deal with separately. This context shows a great variation in the nature of the numerous obligations imposed; it also shows a considerable diversity in the manner of their imposition. Some are positive, others negative; some are placed upon designated persons—e.g., by art. 1 (*a*) of the Order of 1934: "The owner, agent or "manager . . . shall provide a suitable place or places of storage ". . ."; some are placed on members of a particular class doing a particular operation—e.g., by reg. 5 of the General Regulations: "Every workman engaged at the face . . . shall carefully "examine his working place before commencing work"; some apply to anyone in or about the mine—vide the recurrent "No "person shall . . ."; and some are imposed quite impersonally—

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e.g., by art. 2 (*f*) of the Order of 1934: "No shot shall be fired "in any mine except by means of an efficient electrical apparatus "or by means of a fuse complying with the conditions and ignited "in the manner specified in Sch. II hereto . . ."; I am in agreement with the view expressed by Jenkins, L.J., in the Court of Appeal when he said (67): "There are, of course, some "provisions of the Order and Regulations which do impose "statutory duties on the owner in express terms. There may "well be others which should be construed as doing so, even "though the owner is not expressly mentioned as the person "responsible; and in general I think a regulation to the effect "that this or that shall or shall not be done in any coal mine, "without any reference to the person by whom it is to be done "or prevented, would prima facie cast upon the owner, acting "personally or through his agents, the duty of doing or preventing the act in question".

This view recognizes the mine-owner as the source of authority and serves to support, or perhaps I should say explain, the decision of the Court of Appeal as to the nature of the obligations imposed by the now repealed s. 49 of the Coal Mines Regulation Act, 1887, in *David* v. *Britannic Merthyr Coal Co. Ld.* (68). This case, which was strongly relied upon by Mr. Beney for the appellant, is in some ways obscure and difficult to follow, and its value as an authority is not enhanced by the fact that on appeal to this House (69), the reasoning of the Court of Appeal was dissented from in certain unspecified respects, though the order appealed against was affirmed. Nevertheless, it is, I think, correct to say that in so far as the Court of Appeal in *David's* case (68) held s. 49 to impose a direct and personal, if not an absolute, obligation upon mine-owners its decision is authoritative: see *Black* v. *Fife Coal Co. Ld.* (70) and, in particular, the opinion of Lord Kinnear therein. Mr. Beney's argument on this aspect of the matter depended necessarily on establishing a substantial degree of similarity between the relevant parts of s. 49 and the paragraphs of the Order of 1934 now under consideration. When the respective provisions are compared, however, they seem to me to reveal a difference in expression which is significant and amply sufficient to distinguish *David's* case (71). Section 49 commences with the words: "The following general "rules shall be observed, so far as is reasonably practicable, in

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(67) [1950] 1 K. B. 466, 478.

(68) [1909] 2 K. B. 146.

(69) [1910] A. C. 74.

(70) [1912] A. C. 149.

(71) [1910] A. C. 74.

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" every mine . . .", and then there is set out a series of rules directed to specific activities, including one (r. 12 (i)) which says: " No shot shall be fired there unless . . . (2.) all workmen " have been removed from the seam . . .".

The impersonal nature of the important opening sentence of s. 49 will be noted. The distinction between that sort of direction and the direction to a specifically described person such as that with which this appeal is concerned is more than a matter of phraseology. Its significance and effect are clearly recognized in the passage in Lord Kinnear's opinion in *Black's* case (72), where he says: " Now s. 49, as I have already said, imposes certain " specific duties upon particular persons, but it begins with a " general imperative enactment that the rules which are thereafter to be stated in detail shall be ' observed so far as is " ' reasonably practicable in every mine '. I think that is an " enactment expressly directed not only to people who are " charged with the actual performance of specific duties, but also " to the owners who have the ultimate control of the mine. " There is nothing in the form of the language to limit its application to particular persons. It is addressed to all whom it may " concern; and I think it impossible to suppose that the mine-owners are outside the scope of that general enactment ". So far, the relevant context here presents no such " general enactment " or any escape that I can see from the conclusion that paras. (*e*) and (*h*) of art. 2 of the Order of 1934 do not cast a direct or personal duty on the respondents.

I must now refer to reg. 1 of the General Regulations on which Mr. Beney founded a further submission. This Regulation reads thus: " It shall be the duty of the manager and " under manager to carry out and to the best of their ability " enforce the provisions of every Order in force under the Act " regulating the supply, use and storage of explosives, and it " shall be the duty of all persons employed in or about the mine " to comply with the provisions of the said Orders ".

The general effect of the argument here was to attribute to this regulation much the same function as that attributable to the opening words of s. 49 of the Act of 1887. More particularly, it rested on two propositions: (1.) that reg. 1 imposes an absolute duty on the manager and under-manager to carry out the provisions of, inter alia, paras. (*e*) and (*h*) of art. 2 of the Order of 1934; and (2.) that the manager and under-manager were not

(72) [1912] A. C. 149, 163.

in common employment with the appellant and their breach of reg. 1 must therefore be imputed to the respondents. On the authorities I doubt if your Lordships would be disposed to hold that the manager, under-manager and appellant were other than fellow servants for the purposes of the doctrine of common employment; but on the view I take of the first of these propositions it will be convenient to regard the second as well founded and I shall proceed on that assumption.

The trial judge found as a fact that the respondents and their officials had taken all proper precautions to enforce the provisions of the shot-firing regulations and it was for this reason that Mr. Beney laid stress on the words " carry out " and argued that reg. 1 imposed an obligation of a strict or absolute character. The difficulty in his way is that, assuming the expression " carry out " would of itself import an obligation of that nature—and such, I think, may well be the case—the following words " and to the best of their ability enforce " obviously do not do so. The result of this, if the two expressions are to be read as coupled, and applied together to all the provisions of the Order of 1934, is to produce a contradiction in terms sufficiently glaring to justify the rejection of that construction. In my opinion the proper meaning of the regulation is that obtained by reading the words in question distributively, that is to say, the words " carry out " being taken as applying to those provisions which, expressly or impliedly, cast a duty on the manager or under-manager, and the words " to the best of their ability enforce " as applying to those provisions (including paras. (*e*) and (*h*)) which cast a duty on others for whose compliance the manager and under-manager are, as such, responsible. This gives a reasonable meaning to the regulation and does not entail any undue straining of its language. It might have been better to write " or, as the case may be ", instead of " and ", but the conjunctive cannot, according to ordinary usage, be taken as necessarily negativing a distributive interpretation, as witness the common use of " observe and perform " in relation to a series of covenants, some negative and some positive. I think, therefore, if one were to regard only the terms of this regulation, the argument under discussion ought not to succeed. Mr. Beney, however, called in aid the decision of the Court of Appeal in *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (73) that reg. 117 of the General Regulations placed a direct and absolute

(73) [1941] 1 K. B. 154.

obligation upon the mine-owner. This regulation reads as follows: "It shall be the duty of the mine-owner, agent, and "manager to comply with and enforce the following regulations, "and it shall be the duty of all workmen and persons employed "to conduct their work in accordance with the regulations". The language of this regulation is in such marked contrast to that of reg. 1 that I do not think it necessary to discuss the facts or the conclusions in *Yelland's* case. It is enough to observe that reg. 117 is capable of being regarded as imposing an absolute obligation throughout and, further, that it mentions the owner specifically, a consideration which makes the absence of such mention in reg. 1 all the more significant.

For these reasons I conclude that the relevant statutory duty never attached to the respondents directly or personally and that, in consequence, the defence of common employment must prevail.

Mr. Paull, for the respondents, advanced a further and alternative argument to the effect that, the duty in question being placed on Spence exclusively, the respondents could not be made responsible for his breach thereof even if the doctrine of common employment did not apply. In other words, the maxim respondeat superior had no applicability in the case of a statutory duty so laid on a servant. My Lords, on the views already expressed it is not strictly necessary to deal with this submission. But it was debated at sufficient length at the Bar to lead me to think that to reserve it for consideration on some future occasion might give it more encouragement than it deserves. It comes to saying that (apart, of course, from the doctrine of common employment) a master is not vicariously responsible in respect of his servant's statutory negligence. To my mind this, as a general proposition, finds no support in principle or authority. Vicarious liability is not confined to common-law negligence. It arises from the servant's tortious act in the scope of his employment and there can now be no doubt that Spence in breaking the shot-firing regulations committed a tort.

My Lords, the possibility of establishing a defence in suits such as this either under s. 102, sub-s. 8, of the Act of 1911 or by proving facts which would exculpate an owner if charged under the penal provisions of that Act was canvassed to some extent in the course of the debate. But as the respondents did not seek to rely on either of these possible defences I refrain from expressing any opinion upon them.

On the grounds stated I would dismiss the appeal

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LORD REID. My Lords, the Explosives in Coal Mines Order, 1934, made by the Board of Trade under s. 61 of the Coal Mines Act, 1911 (and subsequently amended), provides with regard to shot firing in art. 2 (*e*) and (*h*): " (*e*) The person firing the shot " shall, before doing so, see that all persons in the vicinity have " taken proper shelter and he shall also take suitable steps to " prevent any person approaching the shot. He shall also himself " take proper shelter. If he has reason to believe that there is " a possibility of the shot blowing through into an adjoining place " he shall send verbal warning to the persons in that adjoining " place to take proper shelter ". " (*h*) Where shots are fired " electrically they shall only be fired by a person authorized in " writing by the manager for the purpose. The authorized person " shall not use, for the purpose of firing, a cable which is less " than 20 yards in length. He shall himself couple up the cable " to the fuse or detonator wires and shall do so before coupling " the cable to the firing apparatus. He shall take care to prevent " the cable coming into contact with any power or lighting cables. " He shall also himself couple the cable to the firing apparatus. " Before doing so, he shall see that all persons in the vicinity " have taken proper shelter ".

On January 27, 1948, Spence, a person duly authorized for the purpose, fired a shot in the respondents' mine; but he failed to see that persons in the vicinity had taken shelter, and the appellant, who was in the vicinity, was injured by the explosion. There is no doubt that Spence fired the shot in breach of the statutory duty imposed by the enactment which I have quoted, and that that breach caused the appellant's injuries. The question is whether that statutory duty was imposed on the respondents so that they are liable in damages to the appellant and the defence of common employment is not open to them.

The case must ultimately be decided on the true meaning of those provisions read in their context in the Order of 1934, and that Order must be read together with the Act of 1911 which authorized it. But before considering the terms of that legislation I think that it is necessary to have in mind what has been said in earlier cases, and it is necessary to start with cases under the Coal Mines Regulation Act, 1887. Although the terms of that Act differ materially from the terms of the Act of 1911 the earlier cases have always been cited and discussed in cases under the latter Act.

I must start with *David* v. *Britannic Merthyr Coal Co.*

Ld. (74). There had been breaches of several of the provisions of s. 49 of the Act of 1887 and also of an Order which prohibited the use of gunpowder in the mine, and as a result there was an explosion which killed the plaintiff's husband. The provisions of the Act with which the case was concerned were expressed in an impersonal way. The important words were in s. 49, r. 12 (*f*): " . . . no shot shall be fired except by or under the direction of " a competent person appointed by . . ."; in r. 12 (*h*): " If the " place where a shot is to be fired is dry and dusty, then the shot " shall not be fired unless " certain things were done which had not been done in this case; and in r. 12 (*i*): " . . . no shot shall " be fired there unless . . and moreover all workmen have been " removed from the seam in which the shot is to be fired ". The plaintiff's husband had not been so removed. Before evidence was led Channell, J., intimated that he would rule that the company was not liable if they had done their best to enforce the rules and that the burden was on the plaintiff to prove that they had neglected to do so. No evidence was led about this and judgment was entered for the defendants.

Before the Court of Appeal it was argued that the law as to the onus of proof was wrongly stated to the jury by Channell, J. It does not appear to have been argued that the provisions to which I have referred imposed absolute obligations on the company. The Court of Appeal (Lord Cozens-Hardy, M.R., dissenting) ordered a new trial. Buckley, L.J., said (75): " Had the defendants taken all reasonable means to prevent the breach and yet " had the breach taken place? The onus upon this part of the " case was placed upon the wrong shoulders. The defendants " had prima facie upon the language of the statute committed " an offence under the Act. It was for them to adduce evidence " to show that they had a statutory defence, namely, that they " had taken all reasonable means, etc., to prevent such contravention. Under these circumstances the logical result would " be that, inasmuch as the defendants did not call any evidence " and there was no evidence upon which the jury, if properly " directed, could have found for the defendants, judgment ought " to be entered for the plaintiff. But I am impressed by the fact " that the defendants elected to call no evidence after and consequent upon the ruling of the judge. Under these circumstances " it is only fair that there should not be judgment for the plaintiff, " but that there should be a new trial ".

(74) [1909] 2 K. B. 146; [1910] A. C. 74.

(75) [1909] 2 K. B. 146, 168.

The statutory defence to which Buckley, L.J., referred was that set out in s. 50, the terms of which correspond with those of ss. 75 and 90 of the Act of 1911. That was a section which afforded a defence to an owner if he was prosecuted, and it is not easy to see why Buckley, L.J., thought that it afforded also a defence in a civil action, because he had said a little earlier: "Apart, "therefore, from s. 50, I think that s. 49 creates a statutory duty "in the owner to observe not some only but all of the rules "therein contained: and I think this is a statutory duty in the "owner towards the workman". I would observe in passing that if this is right it is very far-reaching because by no means all of these rules are obviously addressed to the owner. The judgment of Fletcher Moulton, L.J., is long and in parts not very easy to follow, but his view was that the defence under s. 50 only applied in criminal proceedings and was not available in a civil action; nevertheless he agreed that there should be a new trial.

When the case came before this House it does not appear to have been argued that the defence under s. 50 was not available in civil proceedings, or that there was absolute liability on the company or that no new trial was necessary. The speech of Lord Halsbury was short and he did not discuss the question of absolute liability. He made it clear that he disagreed with some of the opinions expressed in the Court of Appeal but he did not say which they were. The decision of the Court of Appeal was affirmed. I find it very difficult to determine what was decided in this House, particularly in view of what was said about this case in two later cases.

In *Black* v. *Fife Coal Co.* (76) the owners had failed to have in charge of the mine persons competent to deal with carbon monoxide gas and a miner died from inhaling it. In the course of his speech Lord Kinnear dealt at some length with the rules in s. 49 of the Act of 1887. With regard to *David's* case (77), he said after discussing the nature of an absolute duty (78): "That "such an absolute duty may be imposed by statute I have no "doubt whatever, and probably there may be some such duties "imposed upon mine-owners by the statute in question. But I "find no such absolute duty in the statute with reference to the "two rules which are said to have been infringed. The table of "rules in which they occur is introduced by the general enact- "ment that the following general rules are to be observed, not

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(76) [1912] A. C. 149.

(77) [1910] A. C. 74.

(78) [1912] A. C. 149, 160–2.

"absolutely and in any event, but 'so far as reasonably practicable in every mine'. Nor are the two rules in dispute "addressed directly to the mine-owners. Section 49 imposes a "variety of obligations upon a variety of persons, some upon "managers and inspectors, some upon working colliers, some "upon owners, and some upon anybody who goes down into the "pit; and the particular rules with which we are concerned are "imposed expressly and directly, not upon the owners them-"selves but upon the manager in charge for the time being, or "upon the person specially appointed by him or the owners for a "certain specific purpose. But it is unnecessary to argue "whether rules so qualified and so directed import an absolute "duty on the respondents or not, because the point is decided "by the judgment of this House in *David* v. *Britannic Merthyr* "*Coal Co. Ld.* (79) . . . It appears to me that by ordering a new "trial on these grounds this House has negatived the absolute "statutory liability for which the appellants contend. For if "each of the rules contained in s. 49 imposes on the mine-owners "an absolute duty irrespective of negligence, it would have been "no answer to say that they had taken all reasonable means to "prevent contravention and no question of onus could have "arisen. But then the case decided at the same time that "although it be not absolute duty, there is still a duty cast upon "the mine-owners in respect of the performance of the statutory "rules even when these are to be actually carried out by other "persons than the mine-owners themselves, and farther, that if "an injury be caused by a breach of the rules, the burden of "proving that they have done all in their power to prevent such "breach lies upon the mine-owners themselves".

In *Watkins* v. *Naval Colliery Co. (1897) Ld.* (80) various explanations of *David's* case (81) were given. A man had been killed owing to the winding machinery being inadequate. Breaches of various rules in s. 49 of the Act of 1887 were proved. Pickford, J., thought that the result of *David's* case (81) was that not all the rules were of equal stringency, that there were two classes of rule, one of which imposed obligations directly on the owner, while the other did not. But he said (82): "I must say that I find some difficulty in seeing the underlying "principle which makes the distinction between these two classes "of rules. The one class is said to impose an obligation directly

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(79) [1910] A. C. 74.

(80) [1911] 2 K. B. 162; [1912] A. C. 693.

(81) [1909] 2 K. B. 146; [1910] A. C. 74.

(82) [1911] 2 K. B. 162, 176.

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" upon the mine-owner. The other class is said to impose an " obligation upon the servant of the mine-owner. In nearly all " these cases the provisions contained in the rules have to be " carried out by servants, whatever the rule may be. In the " case of a limited company, which is by far the most frequent " case now, everything must be done by servants, whether it be " the fencing of machinery, or the provision of adequate " machinery or appliances, or the attending to the shot-firing, or " the use of explosives ". He thought that the rule then in question was a direct obligation on the owners.

This decision was reversed by the Court of Appeal on the grounds that *David's* case (83) was conclusive in favour of the company. Vaughan Williams, L.J., used substantially the same argument as that used by Lord Kinnear in *Black's* case (84) and added (85): " It is argued that some of these rules impose " statutory duties and that some may not do so, and that it " does not follow that because r. 12 (*f*), (*h*) and (*i*) were, by " necessary inference, held by the House of Lords not to impose " an absolute statutory duty, r. 30 does not impose such a " statutory duty. But the judgment of Lord Halsbury makes " no such distinction between the rules, and I think that the " preliminary words of s. 49, ' The following general rules shall " ' be observed, so far as is reasonably practicable, in every " ' mine ', apply at all events to every affirmative rule ".

In this House the judgment of the Court of Appeal was reversed on a ground that had received little attention in the courts below: it was held that there had been a breach of s. 16 of the Act and that that section imposed an absolute duty. Lord Haldane gave a new explanation of *David's* case (86). He said that in *David's* case (86) a new trial was all that was asked for, and that Lord Halsbury had expressed no opinion on the construction of s. 49. I think that this is the best explanation of *David's* case (86), and I am reinforced in this opinion because I can find no later case in which a defendant has been held entitled to avoid civil liability by means of the statutory defence set out in s. 50 of the Act of 1887 and now set out in ss. 75 and 90 of the Act of 1911.

In *Lochgelly Iron and Coal Co. Ld.* v. *M'Mullan* (87) a man had been killed by the fall of a roof. His father brought an action of damages founding on s. 49 of the Act of 1911. In defence s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, was founded on and it became necessary to determine the meaning and effect of s. 49 of the Act of 1911. This section enacts: "The "roof and sides of every travelling road and working place shall "be made secure, and a person shall not, unless appointed for "the purpose of exploring or repairing, travel on or work in any "travelling road or working place which is not so made secure". This corresponds with r. 21 of s. 49 of the Act of 1887. After quoting the section Lord Warrington of Clyffe said (88): "This "involves, it will be noted, an absolute obligation on the owner "to make secure the roof and sides referred to, and a further "obligation that no person shall work in a travelling road or "working place which is not so made secure". So he appears to regard an enactment in the form "a person shall not . . . "work . . ." as a direction to the owner which imposes an obligation on him. Then Lord Warrington of Clyffe went on: "As to "the law on the subject of liability of owners for breach of "obligations imposed by statute for the protection of those "employed by them, I think the following propositions are sup-"ported by authority:—(1.) If the obligation is to do or abstain "from doing a particular thing and on the construction of the "statute the obligation is created for the protection of a par-"ticular class, e.g., workers in a mine or factory, then a member "of that class injured by the non-performance of the obligation "is entitled to sue the owner in an ordinary action founded on "personal negligence. (2.) The fact that the obligation has not "been performed is in itself evidence of personal negligence on "the part of the owner. (3.) That the owner cannot relieve "himself of his obligation by saying that he has appointed "reasonably competent persons and that the breach is due to "negligence on their part. . . ." This makes it quite clear that the defence which this House allowed to be proved in *David's* case (89) is not now available to an owner who is subject to a statutory duty, because if that were available he would escape liability in spite of negligence of his servants if he could show (90) "that he had taken all reasonable means by publishing and to "the best of his power enforcing" the obligation. Lord Macmillan specifically dealt with this point. He said (91): "It is "plain in the first place that s. 49 imposes an obligation on the

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(83) [1909] 2 K. B. 146; [1910] A. C. 74.

(84) [1912] A. C. 149.

(85) [1911] 2 K. B. 162, 182.

(86) [1909] 2 K. B. 146; [1910] A. C. 74.

(87) [1934] A. C. 1.

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(88) [1934] A. C. 1, 13.
(89) [1910] A. C. 74.
(90) [1909] 2 K. B. 146.
(91) [1934] A. C. 1, 18.

" defenders personally for breach of which they are liable, unless " they can bring themselves within the protection of s. 102, " sub-s. 8. If the defenders do not comply with s. 49 they are " rendered by s. 75 personally guilty of an offence against the " Act unless they establish the defence which the statute leaves " open to them ". I read this as meaning that s. 75 affords a defence in criminal proceedings only and that the only defence available in civil proceedings is that set out in s. 102, sub-s. 8. Lord Wright in the same case says (92): " The provisions of " s. 49 of the Coal Mines Act clearly belong to the class which " impose a duty on the employer to take certain precautions for " the protection of his workmen; it is absolute in its terms, save " as modified by the later s. 102, sub-s. 8 ".

Section 102, sub-s. 8, is in these terms: " The owner of a " mine shall not be liable to an action for damages as for breach " of statutory duty in respect of any contravention of or non-" compliance with any of the provisions of this Act if it is shown " that it was not reasonably practicable to avoid or prevent the " breach ". This is a re-enactment in a different and wider form of the initial words of s. 49 of the Act of 1887: " The following " general rules shall be observed, so far as is reasonably prac-" ticable ". I have no doubt that to establish a defence under s. 102, sub-s. 8, it is not enough to show that it was not reasonably practicable for the owner to prevent the breach; it must be shown that it was not reasonably practicable for him or any of his servants. This is a matter of decision both in England and in Scotland (*Yelland* v. *Powell Duffryn Associated Collieries Ld.* (93); *Crane* v. *William Baird & Co. Ld.* (94)) and I think that a comparison of s. 102, sub-s. 8, with s. 102, sub-s. 3, clearly shows that this is right. Section 102, sub-s. 3, provides a defence in criminal proceedings if the owner, agent or manager proves that " the contravention or non-compliance was due to causes " over which he had no control and against the happening of " which it was impracticable for him to make provision ". The insertion of the words " for him " after " impracticable " here and the absence of those words from sub-s. 8 are I think conclusive. If that be so the defence afforded by s. 102, sub-s. 8, is much more limited than that afforded by ss. 75 or 90, where it is sufficient to prove that the owner has done all in his power to enforce the statute. If he has done this that defence succeeds although it may have been perfectly practicable for his servants to avoid the breach.

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(92) Ibid. 22.
(93) [1941] 1 K. B. 154.
(94) 1935 S. C. 715.

I have found no later case which in any way qualifies what was said on this matter in *Lochgelly Iron and Coal Co. Ld.* v. *M'Mullan* (95) and I therefore think that it must now be held that, whether or not *David's* case (96) established any general principle applicable to the Act of 1887, the decision in that case cannot be applied to the Act of 1911. So I must now turn back to *Black's* case (97). Lord Kinnear founded his opinion very largely on his interpretation of *David's* case (98). His opinion has frequently been quoted with approval but on this matter it was obiter, as indeed was the contrary opinion of Lord Haldane regarding *David's* case (98) in the later case of *Watkins* (99); and in any case Lord Kinnear was dealing with a different Act. It is I think necessary to see how far Lord Kinnear was influenced by *David's* case (98) and also to what extent his opinion was founded on features which were present in the Act of 1887 but are absent from the Act of 1911. He lays stress on a feature not present in the later Act. He says (100): "Now s. 49, as I have already "said, imposes certain specific duties upon particular persons, "but it begins with a general imperative enactment that the "rules which are thereafter to be stated in detail shall be "'observed so far as is reasonably practicable in every mine'. "I think that is an enactment expressly directed not only to "people who are charged with the actual performance of specific "duties, but also to the owners who have the ultimate control of "the mine". And later he says (101): ". . . in so far as it is "addressed to the mine-owners that provision in my opinion "imposes on them a duty to use due care and diligence to secure "that the rules shall be obeyed". I think that the passage which follows shows that Lord Kinnear reached the opinion that the owners' duty was of that limited character largely because he was of opinion that the latter part of s. 50 of the Act of 1887 was available to an owner in civil as well as in criminal proceedings. And there is another reason given by Lord Kinnear which later authority does not support. He says (102): "It may be that "certain of the other rules of a different character directly affect "the mine-owner, as was held by the Court of Session in *Bett* v.

(95) [1934] A. C. 1.
(96) [1910] A. C. 74.
(97) [1912] A. C. 149.
(98) [1909] 2 K. B. 146; [1910] A. C. 74.
(99) [1911] 2 K. B. 162; [1912] A. C. 693.
(100) [1912] A. C. 149, 163.
(101) Ibid. 164.
(102) Ibid. 163.

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" *Dalmeny Oil Co. Ld.* (103). But the two with which we are " now concerned are not among these, because mine-owners are " absolutely debarred by the statute from interfering personally " with the management of the mine"; and he says (104): " I " apprehend it might very reasonably be said that mine-owners, " who are themselves precluded from interfering with the working " in the mine, could do no more than take due care to see that " the people whom they employed were competent and had " qualifications adequate to meet the particular danger which " they had to consider". This view has been rejected by this House in *Wilsons & Clyde Coal Co. Ld.* v. *English* (105) in regard to the provision of a safe system of working, and I do not think that it can still be valid as a consideration tending to narrow the scope of an owner's statutory duty. It was also rejected in that connexion by my noble and learned friend Lord Normand when Lord President in *Crane* v. *William Baird & Co. Ld.* (106). In view of these considerations I find it difficult to say what the opinion of Lord Kinnear would have been if he had been considering the nature of duties under the later Act in light of the later authorities.

I must therefore return to the question at issue in this case without any very clear guidance from authority. It is clear that many of the provisions in and under the Act for the safety of workmen impose absolute obligations on the mine-owner. The rule broken in this case is an important provision for the safety of workmen, and it seems to me that the real question in this case is whether there is any essential difference between this rule and those other provisions which admittedly impose an absolute obligation on the owner. I put the question in that way because there have been many cases where a provision making for safety has been held to impose an absolute obligation on the owner, but we were not referred to any case under the Act of 1911 where a safety provision was held not to impose such an obligation. One must look first at the language of the Order.

In this case Jenkins, L.J., said (107): " There are, of course, " some provisions of the Order and Regulations which do impose " statutory duties on the owner in express terms. There may " well be others which should be construed as doing so, even " though the owner is not expressly mentioned as the person

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(103) (1905) 7 F. 787.
(104) [1912] A. C. 149, 168.
(105) [1938] A. C. 57.
(106) 1935 S. C. 715, 730.
(107) [1950] 1 K. B. 466, 478.

"responsible; and in general I think a regulation to the effect "that this or that shall or shall not be done in any coal mine, "without any reference to the person by whom it is to be done "or prevented, would prima facie cast upon the owner, acting "personally or through his agents, the duty of doing or pre-"venting the act in question. But the duties with which this "case is concerned were duties in terms laid upon the shot-firer, "by whom alone they were capable of being performed; and "there is no regulation purporting to lay them on the owner as "well".

My Lords I would be content to find a sufficient distinction in the form of language used if I found, on looking at the rest of the Order, that it led to results which were not unreasonable. But I do not find that. For example, there are in this Order two other rules which deal with almost exactly the same point. Rule 6 provides: "In all cases in which permitted explosives are "required by this Order to be used: . . . (*f*) (i) No shot shall be "fired unless, immediately before the shot is to be fired, the shot-"firer has examined the place where the shot is to be fired and all "contiguous accessible places within a radius of twenty yards "from the place, and has found them clear of inflammable gas "and in all respects safe for firing . . .". And r. 8 provides: "The foregoing provisions shall apply in the case of sinking "operations with the following additions: . . . (*c*) The firing "cable shall not be coupled up to the fuse or detonator wires "until the kettle, kibble, tub, bowk or hoppet is conveniently "placed for the men in the shaft to enter, and the chargeman "has received a signal from the surface that the engineman is "ready to draw away on receipt of the signal to do so, and the "cable shall not be coupled to the firing apparatus until all "persons are in a place of safety".

So, if the matter is to turn on the form in which the enactment is drafted, in the general case to which r. 2 applies the duty to see that other workmen are in a position of safety would only be imposed on the shot-firer but in the special cases to which rr. 6 and 8 apply it would not, because it is stated in general terms in r. 6: "No shot shall be fired unless . . ."; and in r. 8: "the cable shall not be coupled . . . until all persons are "in a place of safety". And this is not an isolated case. I have gone through the whole Order several times and I find many duties stated in the form that a certain thing shall or shall not be done and many others similar in character and equally essential for safety stated in the form that the person concerned shall or shall not do a certain thing. To attribute to the Board of Trade an intention that in the one case the duty shall affect the owner but that in the other it shall not is to attribute to them an intention so capricious that I would not accept this interpretation if any other is reasonably possible. Anyone who has attempted to draft complicated provisions knows the difficulty of keeping to a consistent form of expression, and in this case I am satisfied that differences of expression have only been adopted for convenience of drafting. If a distinction is to be found between duties which are only imposed on a particular servant of the owners and duties which also affect the owners themselves it must, I think, be on some other basis than the form in which the duty is expressed.

I find in the Act itself very much the same difficulty. " Provisions as to safety " form Part II of the Act and include ss. 29 to 75. These provisions vary very much in character. Some deal with matters which can readily be supervised and others deal with matters which may be known only to an individual workman, but in general they are expressed in the same absolute and general way. I cannot find from the manner in which the various duties are expressed any clear-cut distinction to indicate that some are and some are not intended to affect the owner. It is clear on authority that a number of these duties are to be regarded as being absolute duties of the owner. If I take the form in which these duties are expressed and then look at the rest I can find no significant change of expression.

But the difficulty is even greater than that. There is one instance which has some resemblance to the present case. Section 64, sub-s. 1, provides: " The firemen, examiners, or " deputies of a mine shall, within such time not exceeding two " hours immediately before the commencement of work in a " shift as may be fixed by the regulations of the mine, inspect " every part of the mine . . . and shall ascertain the condition " thereof so far as the presence of gas, ventilation, roof and sides, " and general safety are concerned ". Section 65 then provides: " A similar inspection shall be made twice at least in the course " of each shift . . .". Section 64 is expressed as a duty placed on the firemen, examiners or deputies and on no one else, just as r. 2 of the Explosives Order is expressed as a duty placed on the shot-firer and on no one else. But s. 65, which deals with precisely the same matter, is expressed differently: " a similar "inspection shall be made . . .". It is not credible that Parliament intended the duties enacted in ss. 64 and 65 to differ in character and I am confirmed by this instance in my opinion that little weight can be attached to distinctions based on the forms of expression used in this legislation.

There is one other matter which I must deal with in this connexion. There was much argument about the bearing of the General Regulations of 1913 on this case. Those regulations were made by the Home Secretary under s. 86 of the Act and the only reference which they make to explosives is contained in reg. 1. This provides: "It shall be the duty of the manager and under-"manager to carry out and to the best of their ability enforce "the provisions of every Order in force under the Act regulating "the supply, use and storage of explosives, and it shall be the "duty of all persons employed in or about the mine to comply "with the provisions of the said Orders". It will be observed that there is here no mention of the owner, and to my mind the inference is that the position of the owner is left to be determined by such Orders and by the Act itself. It was sought to draw an inference from the fact that the owner is expressly mentioned in Part III of the General Regulations which deals with electricity. It is there provided in reg. 117: "It shall be "the duty of the mine-owner, agent, and manager to comply with "and enforce the following regulations, and it shall be the duty "of all workmen and persons employed to conduct their work "in accordance with the regulations". A possible inference from the fact that the owner is mentioned in the latter but not in the former regulation might be that the intention was that the owner should have no duties at all with regard to explosives, but that was not argued and is plainly wrong. If that is not the inference then I am at a loss to understand what it can be, except that it has been made plain in the General Regulations that the owner has duties with regard to electricity but left to be determined elsewhere what his duties are with regard to explosives. The fact that the duty of the manager is stated more absolutely in reg. 117 than in reg. 1, appears to me to throw little light on the duties of the owner with regard to explosives. The conception of absolute liability of owners is somewhat artificial: it has been developed largely in order to mitigate the unfortunate consequences of the adoption by the courts in the last century of the doctrine of common employment and the fictions which underlie it. Entirely different considerations apply in the case of the manager and I think that it would be hazardous to argue from the one to the other.

Regulation 117 was also used in another way. It was said, I think, that if it was necessary to mention owners there in order to impose absolute liability on them, and if there is no corresponding mention of owners in the Order of 1934, that must mean that there is no general imposition of absolute liability by the Order of 1934. I do not think that this is a strong argument. I do not think that it is right to assume that, because something is inserted in a legislative provision, it must have been necessary to insert it in order to achieve the result intended. It often happens that a draftsman thinks that a word is unnecessary, but would like to insert it to make sure and to relieve those who will have to operate the enactment of the difficulty of having to investigate the position if the word is omitted. I do not think that any principle of construction should be established which would prevent this. And moreover, even if the Home Secretary and his adviser, thought that it was necessary to mention owners, they may have been wrong.

Then it is necessary to notice a further argument that the Board of Trade's Order must be interpreted in light of what the Home Secretary did and that if the Board of Trade did not make any similar mention of owners in their Order they cannot have intended their Order to impose absolute liability. I do not think that that is a proper inference: I do not see why the Order and the Regulations should be read together as if they were parts of a single document. I do not see why, when a Department has exercised its delegated power to legislate under one section, another Department exercising a different power under a different section should have to draft its Order so that it can be construed along with the other as if the two were parts of the same Order. The Board of Trade had to take note of reg. 1 in the Home Secretary's Regulations because it was also dealing with explosives, but I can see no reason why the Board of Trade had to take note of the form in which reg. 117 was drafted. I am therefore of opinion that little assistance towards the interpretation of the Order of 1934 can be got from contrasting it with reg. 117.

If the form in which a duty is expressed does not determine whether the duty directly affects the mine-owner, can that be determined from the nature of the duty? It might have been possible to adopt the view of Lord Kinnear to which I have already referred, and to hold that duties relating to the technical management of the mine do not put any absolute obligation on the owner who is prohibited from dealing with that matter: a direction that a certain thing shall be done cannot, one might think, impose an absolute duty on a person who is prohibited from doing it. But that view has not been adopted: if it had been there would be no absolute duty on the owner with regard to such vital matters as the maintenance of proper ventilation or the maintenance of roofs in a safe condition, because technical management is involved. If then it be accepted that a duty which only qualified servants are allowed to perform can nevertheless be an absolute duty on the owner, and if it be further accepted that the form in which the duty is enacted is in this legislation comparatively unimportant, it appears to me that the duty in question in this case must be held to be an absolute duty on the owner.

The duty in this case is vital for the safety of those in the mine, and it must be carried out in the course of the ordinary work of the mine. I cannot see what more is required. It is relevant to consider what the position will be if this appeal is dismissed. If in that event the owner is still under an obligation to do his best to enforce these regulations, then it is easier to reach the conclusion that the regulations do not impose absolute liability on the owner than it would be if the alternative to absolute liability is that the owner has no duty at all. The only sources of a lesser statutory duty are ss. 75 and 90 of the Act; where they apply they provide that any contravention of a duty by any person has the effect of making the owner guilty of an offence unless he proves that he has done his best to prevent the contravention.

It is now I think settled law that, if an employer is made criminally liable in respect of something which affects the safety of his workmen, civil liability to an injured workman will follow. So if either s. 75 or s. 90 applies to these regulations there will also be civil liability. At first sight s. 90 appears to cover this case because it applies "if any person who is bound to observe "the regulations of any mine acts in contravention of or fails to "comply with any of them". But s. 89, sub-s. 1, enacts that "the general regulations applicable to a mine as supplemented "or modified by the special regulations, if any, for the time "being in force with respect to the mine shall be the regulations "of the mine". The general and special regulations there referred to are I think clearly those made under ss. 86 and 87 of the Act. Part V of the Act is headed "Regulations" and includes only ss. 86 to 90.

The provisions in question in this case are in an Order made under s. 61 of the Act. This section empowered the Secretary of State to "regulate the supply, use, and storage of any "explosives at mines or any class of mines". The powers of the Secretary of State were transferred to the Board of Trade in 1920, and in 1934 the Order now in question was made by that Department. There is no reference in this Order to any section in Part V of the Act of 1911 and I cannot see how, as a matter of construction, the provisions of this Order can be held to be part of "the regulation of any mine" within the meaning of s. 90. Section 61 occurs in Part II of the Act and Part II ends with s. 75 which is similar in character to s. 90, but only applies "in "the event of any contravention of or non-compliance with any "of the provisions of this Part of this Act by any person "whomsoever". Accordingly the criminal liability which it imposes on the owner and the consequent civil liability which the law will infer can only arise if the provisions of the Order of 1934 which Spence contravened in this case can be held to be "pro-"visions of this Part of this Act".

It appears to me that there is a clear distinction between a provision of the Act and a provision of an Order made under the Act. In the first case Parliament has the provision before it when it creates the offence and enacts the penalty: in the second case Parliament is imposing vicarious criminal liability in respect of any provision which the appropriate Government Department may thereafter see fit to enact within the scope of its delegated legislative authority. Of course Parliament may and frequently does delegate authority to create new criminal offences, but I think that an accused person is entitled to require that it shall appear with reasonable clarity that Parliament has delegated power to create the offence with regard to which he is charged. I would adopt the observations of Lord Simonds in *London & North Eastern Ry. Co.* v. *Berriman* (108), where, after citing authorities to the effect that, where there are two reasonable interpretations of an enactment, one of which involves the imposition of a penalty while the other does not, the latter interpretation should be adopted, he said: "It was suggested, my "Lords, that some distinction is to be made in the application

(108) [1946] A. C. 278, 313–4.

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" of this rule according to the avowed purpose of the Act. It " would, I think, be unfortunate if any decision of this House " gave any colour to such a suggestion. Wherever the legislature " prescribes a duty and a penalty for the breach of it, it must " be assumed that the duty is prescribed in the interests of the " community or some part of it and the penalty is prescribed as " a sanction for its performance. Whether the purpose is, as it " was in *Tuck's* case (109) the protection of copyright, or, as in " the case before your Lordships, the protection of the life and " limb of certain workers, the same principle prevails. A man " is not to be put in peril upon an ambiguity, however much or " little the purpose of the Act appeals to the predilection of the " court ".

In this case if an owner were charged under s. 75 with an offence in respect that someone else had contravened a provision of the Order of 1934, that being a provision which was not addressed to the owner, I am of opinion that that charge must fail. Section 61 does not state that Orders made under it are to be deemed to be part of the Act or are to have effect as if they were part of the Act, and I can find nothing from which it can be inferred, and certainly nothing from which it can be clearly inferred, that provisions of such orders are " provisions of this " Part of this Act " within the meaning of s. 75. So there can in this case be no civil liability arising out of criminal liability, and I am therefore of opinion that, unless the provisions now in question are held to be addressed to the owner as well as to the shot-firer, the owner is under no civil liability under the statute even if he does nothing at all to see that they are complied with. I am therefore of opinion that the duty in question in this case must be held so to affect the owner as to make the respondents liable to the appellant for its breach and that this appeal should be allowed.

There is one other matter to which I should refer. As the defence of common employment has now been abolished it might seem that, apart from the financial interest of the parties, this case has now only academic importance. But counsel for the respondents made it clear that that is not necessarily so. If his argument is right, whenever a workman is in breach of a statutory duty which is purely personal to the workman it will be necessary to determine whether the workman in failing to carry out his statutory duty was also guilty of negligence at

(109) (1887) 19 Q. B. D. 629.

common law. If he was, then his master must answer for his negligence to a fellow servant who had been injured by it. But if he was not, and his only fault was breach of his statutory duty, then it is said that his master is not answerable for that. If Parliament has put no duty on the employer, or if the only duty which Parliament has put on the employer is that he shall do his best to see that his servant carries out his statutory duty, and if the employer has done his best, then he has done all that is required of him, although he had not been able to prevent the breach.

On what ground then is he liable in damages? In the ordinary case a servant is acting for his master in doing what his master has given him or must be held to have given him to do. Then qui facit per alium facit per se and the master is liable for the servant's fault. But in performing a statutory duty which is purely personal to the servant, the servant is not acting for his master; his right and duty to act do not flow from his master's orders or authority: he is doing something which Parliament has directed him and no one else to do, and he is doing it only because Parliament ordered him to do it, so his failure to do it cannot be attributed to his master so as to make his master liable in damages. That is the argument as I understand it. I do not propose to express any opinion about that argument, but it is not one which I can dismiss summarily as unworthy of consideration.

Appeal dismissed.

Solicitors: *Corbin, Greener & Cook, for Raley & Pratt, Barnsley; R. S. S. Allen.*

J. C.*
1951
July 16.

HARNAM SINGH . . . . . . APPELLANT;

AND

JAMAL PIRBHAI . . . . . . RESPONDENT.

ON APPEAL FROM THE EASTERN AFRICA COURT OF APPEAL.

Eastern Africa (Kenya)—Landlord and tenant—Rent restriction—Claim to possession—Property occupied both for residential and business purposes—Not simultaneously ascribable to both categories—Test of dominant feature or user—Alternative accommodation—

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD RADCLIFFE AND RINFRET, C.J. OF CANADA.

Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, *s.* 11, *sub-s.* 1 (*d*); *s.* 19 (*a*).

The effect of ss. 11 and 19 of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, of Kenya is to create two independent codes applying to dwelling-houses on the one hand and to premises used for business purposes on the other, and in the case of "mixed premises" which have some connexion with both descriptions it must be ascertained for the purposes of the Ordinance to which of the two categories such property ought the more appropriately to be ascribed, since it is a contradiction in terms that it should be ascribed simultaneously to both.

If *Tompkins* v. *Rogers* [1921] 2 K. B. 94 was intended as a decision that a property could be at one and the same time a dwelling-house and business premises for the purpose of the United Kingdom Rent Restriction Act of 1920 and protected as such under both heads, it cannot be regarded as offering a satisfactory construction of the Act, and, if understood in that sense, is inconsistent with the earlier decision of *Waller & Son Ld.* v. *Thomas* [1921] 1 K. B. 541, which was preferred in *Colls* v. *Parnham*, [1922] 1 K. B. 325.

Since the statutory scheme in Kenya requires a choice between the two categories of property—dwelling-house or business—some test such as that of dominant feature or user should be applied in ascertaining into which category a particular "mixed property" falls. Accordingly, since property owned by the landlord, of which he sought possession from the tenant, who occupied it as a dwelling-house and used part of it for the purposes of his business as an auctioneer, was structurally residential and the business user was ancillary to the main user as living accommodation, the property must be treated as a dwelling-house for the purposes of the Ordinance; and, since it was as a dwelling-house that the property qualified for protection, it must be in respect of its suitability as dwelling accommodation that the alternative accommodation offered by the landlord was to be regarded.

The Board, having held that the landlord was in all other respects entitled to an order for possession, remitted to the Supreme Court of Kenya the question whether it would be, as required by s. 11 of the Ordinance of 1940, "reasonable" to make such an order.

Order of the Eastern Africa Court of Appeal reversed.

APPEAL (No. 8 of 1950) from an order of the Court of Appeal for Eastern Africa (March 9, 1949) affirming an order of the Supreme Court of Kenya (November 5, 1948) whereby an action brought by the appellant against the respondent for possession of premises in Nairobi owned by the appellant and occupied by the respondent both as a dwelling-house and for business purposes was dismissed.

The relevant facts appear from the judgment of the Judicial

Committee. The principal question on the appeal was whether, on the true construction of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, of Kenya, and in particular of ss. 11 and 19, it was necessary, as was held by the Court of Appeal for Eastern Africa (Nihill, P., Graham Paul, C.J., and Edwards, C.J.), for a landlord who sought to recover possession of premises subject to the Ordinance (as extended by Proclamation No. 53 of 1941 of the Governor in Council) and used both as a dwelling-house and for business purposes, to show that the premises were reasonably required by him both as a dwelling-house and for business purposes and that alternative accommodation was available for the tenant suitable both as a dwelling-house and for business purposes, or whether there was a dichotomy of all premises subject to the Ordinance into dwelling-houses and business premises, and it was only necessary to show in respect of any one set of premises either, if they were a dwelling-house, that the landlord reasonably required them as such and that alternative accommodation was available for the tenant suitable as a dwelling-house, or, if they were business premises, that the landlord reasonably required them as such and that alternative accommodation was available for the tenant suitable as business premises.

The trial judge (de Lestang, J.) based his judgment on two alternative grounds in addition to that which was adopted by the Court of Appeal: he held that a contractual monthly tenancy had been created in favour of the respondent which the appellant had failed at the date of the issue of the writ in this action to determine by notice, and that therefore the provisions of the Ordinance of 1940 as to recovery of premises subject to a statutory tenancy did not apply. He further held that the appellant already occupied a dwelling-house and that an order for possession in his favour would confer on him the right to occupy more than one dwelling-house at the same time contrary to the provisions of s. 11, sub-s. 2, of the Ordinance.

The material sections of the Ordinance are as follows:—

"11.—(1) No order for the recovery of possession of any "dwelling-house to which this Ordinance applies, or for the "ejectment of a tenant therefrom, shall be made unless—

* * * * * *

"(*d*) the dwelling-house is reasonably required by the land-"lord for occupation as a residence for himself or for "his wife or minor children, or for any person bona fide

> "residing, or to reside, with him, or for some person "in his whole time employment or in the whole time "employment of some tenant from him, and (except "as otherwise provided by this sub-section) the court "is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all "respects, is available;

* * * * * *

"(2) Nothing in this section contained shall be deemed to "permit a landlord to recover possession of a dwelling-house if by "such recovery he and his wife and/or minor children would be "in occupation of, or would acquire the right to occupy, more "than one dwelling-house at the same time".

"19. The Governor in Council may, by Proclamation, declare "that the provisions of this Ordinance shall apply to any area, "district or place in the Colony in respect of premises used for "business, trade or professional purposes, or for the public "service, as it applies to a dwelling-house in that area, district "or place, and with effect from the date of such Proclamation, "or from a date specified therein, this Ordinance shall be read "as though references to 'dwelling-house', 'house' and "'dwelling' included references to any such premises, provided "that the Ordinance in its application to such premises shall have "effect subject to the following modifications:—

> "(*a*) The following paragraph shall be substituted for paragraph (*d*) of sub-section 1 of section 11 of this "Ordinance:—
>
> > "'(*d*) The premises are reasonably required by the "'landlord for business, trade or professional "'purposes or for the public service, and "'(except as otherwise provided by this "'sub-section) the court is satisfied that "'alternative accommodation, reasonably "'equivalent as regards rent and suitability "'in all respects, is available'; . . .".

1951. June 7, 11, 12. *Sir Andrew Clark, K.C.*, and *Michael Albery* for the appellant landlord. The respondent was not a contractual tenant, but a statutory tenant under the Ordinance of 1940. It is so stated in the first of the reasons in the tenant's own case; and in reply to a notice to quit the tenant's solicitors wrote "our client will not vacate the premises in accordance with "your notice, but will remain in occupation as a statutory tenant "from the date of the expiry of the notice". He is estopped from asserting the contrary.

The second and main question is whether the fact that these premises were used both for residential and for business purposes gives them a double protection, both the protection afforded to dwelling-houses and that afforded to business premises. Although premises may be used for both residential and business purposes, they remain a single set of premises for the purposes of protection under the Ordinance. They do not have double protection. Where premises are already protected by the Ordinance as a dwelling-house, they remain unaffected by any extension of protection which arises by reason of the proclamation extending the Ordinance to premises used for business purposes, and it is only premises which were previously unprotected which then acquired protection for the first time by virtue of the proclamation. It is the occupation of the premises which is protected by the Ordinance, not the user.

Secondly, in any event it would be an impossible construction of the Ordinance to hold that it afforded double protection. In respect of any given set of premises either the provisions of s. 11, sub-s. 1 (*d*), apply or they do not. If they do apply, then the provisions contained in para. (*a*) of s. 19 cannot apply, because it is thereby provided that such provisions shall not be added to but shall be substituted for those of s. 11, sub-s. 1 (*d*). This shows that the two forms of protection are complementary but not cumulative. Indeed, if they were cumulative it would be in practice almost impossible for a landlord ever to recover possession of premises which a tenant was not expressly prohibited from using for both business and residential purposes. The language of the section clearly shows that the two forms of protection are mutually exclusive; it would be extravagant to suppose that it was intended by the section to oust the protection already existing in respect of dwelling-houses whenever such a dwelling-house was used, no matter how slightly, for a business purpose.

Thirdly, to hold that double protection is conferred is wrong in law on the authority of the English cases decided during the period until June 20, 1920, when the English Rent Acts applied to business premises by virtue of s. 13, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. *Tompkins* v. *Rogers* (1), which was much relied on upon this point in

(1) [1921] 2 K. B. 94.

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the courts below, was decided without argument on behalf of the respondent landlord who was not represented on the appeal to the Divisional Court, and is not, it is submitted, a case which should be followed. The previous contrary decision in *Waller & Son Ld.* v. *Thomas* (2) was not cited to the court in *Tompkins'* case (1). In *Waller & Son Ld.* v. *Thomas* (2) it was held that a public house containing residential accommodation fell within the general provisions of the Act of 1920 relating to dwelling-houses and did not constitute business premises within the meaning of s. 13, sub-s. 1, thereof, the language of which is for this purpose identical with that of s. 19 of the 1940 Ordinance. In *Waller's* case (2) precisely the same argument as to "double "protection" which formed the basis of the judgments in the courts below in the present case was put forward by counsel for the tenant, but was rejected by the court, which held that it was not necessary to offer alternative business accommodation. *Waller's* case (2) appears not to have been cited to either of the courts below in the present case. Both *Tompkins'* case (1) and *Waller's* case (2) were considered in *Colls* v. *Parnham* (3), when the latter was preferred, Shearman, J., saying *Tompkins'* case (1) "presents great difficulties". [Reference was also made to *Duke of Richmond* v. *Dewar* (4).] It is not necessary where premises are used both for residential and business purposes to offer alternative business accommodation, and nothing outside mere dwelling-house accommodation can be taken into consideration: *Middlesex County Council* v. *Hall* (5). Whether the business user would come in at all is within the discretion of the court in considering whether in all the circumstances of this case it is reasonable to make the order. It is a matter which should receive some consideration, and the question is how much weight should be given to it—it is submitted only minor weight: *Briddon* v. *George* (6). The house is protected as a dwelling-house only, and all that was necessary for alternative accommodation was residential premises, and it was held that suitable dwelling-house accommodation was available.

The landlord is therefore prima facie entitled to possession unless he is precluded from recovering by virtue of s. 11, sub-s. 2, of the Ordinance. The true construction of that sub-section

(1) [1921] 2 K. B. 94.
(2) [1921] 1 K. B. 541.
(3) [1922] 1 K. B. 325.
(4) (1921) 38 T. L. R. 151; [1921] W. N. 356.
(5) [1929] 2 K. B. 110.
(6) [1946] 1 All E. R. 609, 610.

is that an owner of several houses, one of which he occupies himself and the remainder of which are let, cannot obtain an order for possession of more than one of his let houses. In other words, he can obtain an order for possession of one of his let houses, but unless and until he has let it again, and it is not in his occupation, he cannot obtain an order for possession of another. Where he is occupying a house which has never been let, that house is not a dwelling-house within the meaning of the Ordinance. which is intended to prevent a landlord getting rent restricted houses out of the Act. In any event, on no view of the Ordinance is the appellant in this case in occupation of a dwelling-house—he occupies some rooms in a factory which he owns—and this sub-section does not apply to the present case. *Tara Singh* v. *Harnam Singh* (7) supports the submission for the appellant on s. 11, sub-s. 2. He is not precluded by that sub-section and is therefore prima facie entitled to an order for possession.

The last question is whether it is reasonable on the facts of this case that an order for possession should be made. Section 11 of the Ordinance gives the court a discretion as to making an order where it is reasonable. The question of the exercise of that discretion has not been decided by either court below; it did not arise. In those circumstances it is now open to this Board to exercise the discretion, or the case could be sent back to determine whether it was reasonable or not.

[Counsel was not required to deal further with this point.]

Albery, following, referred to *Langford Property Co. Ld.* v. *Batten* (8).

Khambatta, K.C., and *Dingle Foot* for the respondent tenant. Because the Court of Appeal has assumed that the tenancy comes within the operation of the Ordinance the tenant is not debarred from taking the point now that he was a contractual tenant.

[*Sir Andrew Clark, K.C.* It is not contended that if this was a contractual tenancy the notice to quit was good, but the notice was accepted in such a form as to amount to a surrender.]

[LORD SIMONDS. According to the letter of August 25, 1943, from the tenant's solicitors to the landlord, the tenant remained in occupation as a statutory tenant; and in the first of the reasons in the case for the tenant it is stated that the tenant was a statutory tenant.]

Khambatta, K.C. A bad notice to quit cannot be cured by acceptance of it—by not challenging its validity—and if the

(7) (1944) 11 E. A. C. A. 24, 28.

(8) Ante, 223.

contract is not terminated the Rent Restriction Ordinance does not come into operation. To turn to the main point, it was argued that by necessary inference and on construction the intention of the legislature was to cover only premises used for residential purposes and not to afford double protection. That is to overlook the express provisions of s. 19, which show that there is the clearest intention in such a case as the present to give double protection. Unless there is an express proviso taking away the double protection which s. 19 (*a*) clearly gives there is no ground for reading that proviso into s. 19 (*a*). *Tompkins* v. *Rogers* (9) was correctly decided in principle. *Waller & Son Ld.* v. *Thomas* (10) does not consider the question of double protection; it only says that what has to be looked at is the dominant user. *Waller's* case (10) is based, it is submitted, on a misinterpretation of *Epsom Grand Stand Association Ld.* v. *E. J. Clarke* (11), the underlying principle of which is that if there is found in the terms of the agreement the nature of the letting as a dwelling-house, then it falls within the statute nonetheless so because it was used as a public house. It follows that if the terms of the agreement were that the tenancy was one for business purposes, and if the statute afforded protection to premises used for business purposes, then the letting would fall within the terms of that statute nonetheless so because the premises which were let for business purposes were also used as a dwelling-house. It is on that principle that *Tompkins'* case (12) was rightly decided. The principle of the *Epsom Grand Stand Association* case (11) has been emphasized in some recent judgments: *Barrett* v. *Hardy Bros. (Alnwick) Ld.* (13); *Vickery* v. *Martin* (14). The landlord failed to satisfy the courts below, as he should have done, that he reasonably required the premises both for residential and business purposes, and he also failed to show that alternative accommodation reasonably equivalent as regards rent and suitability in all respects was available.

On the assumption that the tenant is wrong as to double protection afforded under the Ordinance, it is submitted that if the landlord were in occupation of one house he could not get possession of another dwelling-house: an order for possession would have conferred on him the right to occupy more than one dwelling-house at the same time and would therefore have been

(9) [1921] 2 K. B. 94.
(10) [1921] 1 K. B. 541.
(11) (1919) 35 T. L. R. 525; [1919] W. N. 170.
(12) [1921] 2 K. B. 94.
(13) [1925] 2 K. B. 220, 225.
(14) [1944] K. B. 679, 682.

contrary to s. 11, sub-s. 2, of the Ordinance. Where a landlord and his family are in occupation of one dwelling-house he is put out of going to court and seeking his remedy even though there is a breach of the terms of his covenant.

Dingle Foot, following. It makes no difference at all on the English authorities that the business user was in addition to user as a dwelling-house: in *Waller's* case (15) the premises remained a dwelling-house even though the dominant user was that of a public-house. See also *Vickery* v. *Martin* (16). And in *Luttrell* v. *Addicott* (17), as in the last two cited cases, the dominant user was held to be business, and yet the Act was held to apply. In the present case the position is the converse. It follows on the above authorities that it would make no difference in cases such as the present if the greater part of the premises were used as a dwelling-house as long as a part is clearly used, and was intended at the time of the original letting to be used, for business purposes. It is clear that part of these premises was so used. It was intended by the Ordinance that there should be protection for business purposes, and it would be an absurdity if the tenant of business premises should lose that protection simply because some part of the premises were already protected as a dwelling-house.

Sir Andrew Clark, K.C., in reply. *Gidden* v. *Mills* (18) shows that the lease is looked at to see what user was contemplated, and then the actual user is looked at to determine whether the premises are let as a dwelling-house or for business purposes. The only way to determine which, is to look at the dominant user, which in the present case was that of a dwelling-house. The only object of the proclamation was to extend the protection of the Ordinance to premises which were not previously protected.

[Counsel was not required to argue the question whether the tenancy was contractual or statutory.]

July 16. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal concerns the claim of the appellant to be awarded possession of property known as Plot No. 2555, Government Road, Nairobi, which belongs to him but is in the occupation of the respondent. The Supreme Court of Kenya (de Lestang, J.) and the Court of Appeal for Eastern Africa (Sir Barclay Nihill, P., Graham Paul, C.J., and Edwards, C.J.) have held that the appellant is not entitled to an order for possession and have dismissed his suit (Civil Case No. 207 of 1948). Their Lordships have come to a different conclusion.

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(15) [1921] 1 K. B. 541.

(16) [1944] K. B. 679.

(17) [1946] 2 All E. R. 625; 63 T. L. R. 68.

(18) [1925] 2 K. B. 713, 722, 726.

The relevant facts are clearly stated in the judgment of de Lestang, J. It is sufficient for the purposes of this appeal to say that the respondent, whose calling is that of an auctioneer, has been in continuous occupation of the appellant's property (which it is convenient to refer to as "the premises") since the year 1931. The premises consist of a dwelling-house with four or five rooms and a verandah, a separate block of servants' quarters, and a considerable area that surrounds the buildings in the form of a yard. At the back of the premises, on the side furthest from Government Road, is another property, Plot No. 2556, which belongs to the respondent and consists of a sale room, yard and store. Both properties have been regularly used by him for the purpose of his auctioneer's business, but the appellant's premises only to the extent of storing goods in the yard and under the verandah and of using the verandah itself as a place from which to conduct some part of his auctions.

It seems that the respondent's right to occupation of the premises has been renewed from time to time since 1931. At any rate, on June 27, 1939, he was granted a lease in writing for a term of two years from April 1, 1939, at a monthly rental of Shs. 280. That lease contained a clause to the effect that if either lessor or lessee should desire to determine the then demise at the expiration of the term thereby granted, then either party should give to the other six months' previous notice in writing of his intention so to do. In fact, no such notice was given. Whatever might have been the legal consequence had nothing more happened, what did happen was that in January, 1941, the parties came to a new agreement, recorded in writing, under which the respondent was to continue in possession of the premises for a further term of eleven months as from the expiry of the lease at a reduced rent of Shs. 250 per month. The respondent has throughout maintained that the effect of that new agreement, when imposed upon that already existing, was to extend the term created by the lease for an indefinite period, determinable only on six months' previous notice. Neither of the courts in Africa has accepted this interpretation. Nor do their Lordships. It must be taken, therefore, that as from March 1, 1942, the terms created under these two successive instruments in writing had come to an end. No further written arrangement was recorded. The respondent remained in possession, paying monthly rents of varying amounts; but, as the nature of his title to possession during this period has been a matter of controversy in these proceedings, it is convenient to defer dealing with it until reference has been made to the relevant legislation.

There has been a system of rent and mortgage restriction operative in Kenya at all material times. This was instituted by the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, an ordinance which, while adopting the general scheme and much of the phraseology of the comparable legislation of the United Kingdom, is not by any means the same measure as the Act of 1920 (10 & 11 Geo. 5, c. 17), nor has it undergone the same frequent amendments as the scheme that has prevailed in this country. It has the effect of protecting the tenant of a dwelling-house (defined by s. 2 of the Ordinance as "any house or part of a house let as a separate dwelling where "such letting does not include any land other than the site of "the dwelling-house and garden or other premises within the "curtilage of the dwelling-house") from being subjected to an order for the recovery of possession or for ejectment except under the restrictions and subject to the conditions which are set out in s. 11 of the Ordinance. A tenant who holds over after his contractual tenancy has expired but in reliance on the protection of the Ordinance thus acquires a form of statutory holding, the obligations of which are laid down by s. 17, and he is usually referred to as a "statutory tenant".

In the present suit the appellant took up the position, which is detailed in his amended plaint, that the respondent had been a statutory tenant, at the latest, since April 1, 1943, and that his own action in seeking to recover possession complied with all the requirements which the Ordinance imposed on a landlord in those circumstances. In fact, he wanted the premises for himself and his family to live in and was prepared to offer what was, he said, suitable alternative accommodation. The respondent's position on the other hand, as already mentioned, was based on the contention that he was in possession as a contractual tenant who had never received the notice to quit to which his tenancy entitled him. It is necessary, therefore, to decide what was the nature of the respondent's holding at the time when the suit was begun.

The trial judge rejected the view that there was a statutory tenancy, and came to the conclusion that as from March 1, 1942, the respondent had been in possession as tenant from month to month, the tenancy being terminable by fifteen days' notice expiring at the end of any month of the tenancy. This implication he imported from the terms of the Indian Transfer of Property Act. He recognized, no doubt correctly, that under a system of rent restriction such as prevailed here the legal significance of a tenant remaining in possession after the expiry of a fixed term may not be the same as it would be under a system which contains no such restriction: but he thought that the conduct of the parties since March, 1942, pointed conclusively to the creation of a contractual tenancy. The conduct to which he alluded was the fact that during the months that followed that date the parties had agreed on varying amounts for the monthly rent, which did not rise to the sum of Shs. 280 (presumably the standard rent) until March, 1943. In his view, had there been a statutory tenancy, the respondent must have been paying " one " rent, i.e., the standard rent at all times ".

Their Lordships have found it impossible to accept the learned judge's conclusion that at the date of suit there was in existence something other than a statutory tenancy. They consider that as between these parties this point is disposed of by the letter which the respondent's solicitors wrote to the appellant on August 25, 1943, and which is referred to in para. 11 of the amended plaint. The appellant had on the previous day served the respondent with one of several successive notices to quit, possession being required on or before September 30, 1943. To this the solicitors replied:—" Our client will not vacate the " premises in accordance with your notice but will remain in " occupation as a statutory tenant from the date of the expiry of " the notice ". This statement is both explicit and conclusive. It is an unequivocal intimation that as from the coming September 30 the respondent will claim no tenancy rights as a matter of subsisting contract but will thereafter treat himself as a tenant holding over under the protection of the Ordinance. In their Lordships' view that letter created an estoppel between the parties. The trial judge declined to treat it in this way, partly because estoppel had not been specially pleaded and partly because the appellant had relied on his notice being a good and valid notice to quit.

As regards the first ground, it would be a mistake to invoke it in this case. The appellant's counsel made a full argument to the effect that the notice to quit as at September 30, 1943, had been " accepted " and that the respondent had thereby become a statutory tenant (which is only another aspect of the estoppel argument), and he contended that the respondent was " estopped " by subsequent conduct in paying increased rent under s. 9 of the Ordinance. Indeed, the judge found that he had "behaved as a statutory tenant" and paid rent as such. Moreover, the conclusion that the true position was that of a contractual tenancy from month to month was itself inconsistent with the defence of the respondent: and it would be unsatisfactory to allow a departure from the facts as pleaded on one side while treating the other as debarred by defect of pleading from raising an answer the substance of which was plainly in issue before the court. As to the second ground, it is not a relevant consideration for this purpose, since there is nothing to suggest that after receiving the letter of August 25, 1943, the appellant ever supposed that he had anything but a statutory tenant to deal with.

Their Lordships conclude, therefore, that the respondent must be regarded as a statutory tenant. This is not inconsistent with the views of the Court of Appeal in Africa, who were content to treat him as a statutory tenant for the purpose of their judgments, without deciding the question whether that was or was not his true legal position.

The next question is the substantial one in this appeal. For both the trial judge and the Court of Appeal have held that, in the case of premises such as these, which are used by the tenant both for residential and for business purposes, the effect of the Ordinance is to give the tenant what has been called "double "protection". The meaning of that may be expressed in the words of the trial judge:—"In my view a landlord who seeks to "recover what I may for convenience call mixed premises must "satisfy the requirement of the law relating to both kinds of "premises, i.e., he must require the premises both for the "purpose of residence and for business and he must offer in "return premises suitable both for dwelling and business "purposes".

It must be observed that, if that is the law in Kenya, it imposes on landlords of such premises very onerous conditions indeed as a prerequisite to the recovery of their possession. But in Kenya, though not in the United Kingdom except for the brief period, July 2, 1920, to June 24, 1921, when s. 13 of the Act of 1920 was in force, business premises are within the scope of the Ordinance. This is brought about by s. 19, whereby the Governor in Council is given authority, by proclamation, to apply the provisions of the Ordinance to any area, district or place in the Colony "in respect of premises used for business, trade or professional "purposes, or for the public service, as it applies to a dwelling-

"house in that area, district or place". The section then goes on to declare that, on that being done, the Ordinance is to be read as though references to "dwelling-house", "house" and "dwelling" included references to any such premises and that in its application to such premises the Ordinance is to have effect subject to certain prescribed modifications. These modifications include the substitution of a new para. (*d*) for para. (*d*) of sub-s. 1 of s. 11 of the Ordinance. As this paragraph is the material one for the purposes of the present claim to possession it will be convenient to set out the two contrasting paragraphs (*d*).

As applied to a dwelling-house, it runs:—"(*d*) the dwelling-"house is reasonably required by the landlord for occupation as "a residence for himself or for his wife or minor children, or for "any person bona fide residing, or to reside, with him, or for "some person in his whole-time employment or in the whole-time "employment of some tenant from him, and (except as otherwise "provided by this sub-section) the court is satisfied that alterna-"tive accommodation, reasonably equivalent as regards rent and "suitability in all respects, is available;"

As applied to premises used for business purposes, it runs:—"(*d*) the premises are reasonably required by the landlord for "business, trade or professional purposes or for the public ser-"vice, and (except as otherwise provided by this sub-section) the "court is satisfied that alternative accommodation, reasonably "equivalent as regards rent and suitability in all respects, is "available;" In the year 1941 a proclamation of the Governor in Council applied the provisions of s. 19 to the Municipality of Nairobi.

In their Lordships' view the effect of this legislation was to create two independent codes applying to dwelling-houses on the one hand and to premises used for business purposes and the other specified purposes (which for brevity may be called "business "premises") on the other. In each the subject the possession of which is under statutory protection is a physical unit, either the dwelling-house or the business premises; and in the case of "mixed" premises, which have some connexion with both descriptions, the true problem is to discover to which of the two categories such a property ought the more appropriately to be ascribed, since it is a contradiction in terms that it should be ascribed simultaneously to both. To concede double protection, in the sense that that phrase has been used by the courts in Africa, is in reality to protect the same unit of property as if each of its two different aspects constituted a separate unit: but the

Ordinance is not expressed in terms that admit of such a form of protection. Indeed, their Lordships have found it impossible to see how this conclusion can legitimately be arrived at.

The two alternative forms of s. 11, sub-s. 1 (*d*), illustrate the contradiction which is involved in such a construction. If proceedings are taken to obtain possession of a piece of property, say Plot No. 2555, Government Road, Nairobi, either the provisions of sub-s. 1 (*d*) as applied to a dwelling-house will be the operative statutory provision governing the right to possession of that property or the different provisions of sub-s. 1 (*d*) as applied to business premises. But, since one is substituted for the other, they cannot both apply at the same time to the same property, nor can either provision both apply and not apply at the same time. The result is that a system of legislation that affords protection both to dwelling-houses and to business premises, though not in all respects in the same terms, necessarily involves a decision whether any particular property is a dwelling-house or is business premises or is neither of these for the purposes of the Act.

It is obvious from a perusal of their judgments that the conclusion which the African courts arrived at on this point was much influenced by the English decision *Tompkins* v. *Rogers* (19), a decision which, as they rightly appreciated, had a direct bearing on the problem before them, since it was given at a time when the United Kingdom system, like the Kenya system, protected business premises as such as well as dwelling-houses as such. But, unfortunately, *Tompkins* v. *Rogers* (19) is not itself a case that has escaped criticism in the English courts. It related to a claim for possession of a house which was kept partly as a private residence and partly as a boarding house for lodgers. The alternative accommodation offered by the claimant was a vacant dwelling-house; he required possession of the house in question for private occupation, not for business. The justices before whom the case originally came decided that he was entitled to possession. This decision was reversed on appeal, the respondent not being represented.

If the decision amounted to no more than a decision that the premises must be treated as business premises and not as a dwelling-house for the purposes of the Act of 1920 it might provoke comment as an unusual decision on the facts of the case, but it would not otherwise call for comment. But if it was intended as a decision that a property could be at one and the same time a dwelling-house and business premises for the purpose of the Act and protected as such under both heads, their Lordships are unable to regard this case as one which offers a satisfactory construction of the Act. Their reasons have been set out above. It is, if understood in this sense, inconsistent with the previous decision of *Waller & Son Ld.* v. *Thomas* (20), in which a public house used as such but also as a dwelling-house was held not to be entitled to protection as business premises within s. 13 of the same Act. When these two cases came to be considered together in *Colls* v. *Parnham* (21) it is clear that *Waller & Son Ld.* v. *Thomas* (20) (which had not been cited in *Tompkins* v. *Rogers* (22)) was the decision that was preferred. Shearman, J., spoke of *Tompkins* v. *Rogers* (22) as a case that "presents great "difficulties". He also said that the court had recently refused to follow its authority when another appeal came before them on a similar set of facts. Salter, J., who had been a party to the decision in *Tompkins* v. *Rogers* (22), said of it that if the decision was that "if premises are used for business purposes they cannot "be a dwelling-house within the Act, I think myself that it can"not be supported": a retraction which, at least, does nothing to dispel the uncertainty as to what it was that the court in *Tompkins* v. *Rogers* (22) did intend to decide. Moreover, in the later case of *Duke of Richmond* v. *Dewar* (23) *Tompkins* v. *Rogers* (22) was spoken of as a decision that might well require reconsideration. For these reasons their Lordships are of opinion that the reasoning of that unsatisfactory case cannot be used as a guide in the present appeal.

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(19) [1921] 2 K. B. 94.

It becomes necessary to decide, therefore, whether the premises are a dwelling-house or business premises. It seems reasonably clear that they are a dwelling-house. Since the statutory scheme requires a choice between the two categories of property it is unavoidable that some test such as that of dominant feature or user should be applied. The lease itself is of no assistance, because it sanctioned user for either purpose or both. But, structurally, the premises are residential; and such business user of them as has taken place was ancillary to the main user as living accommodation. In coming to this decision their Lordships have not found it useful to place reliance on English authorities. For the course of those decisions has been affected by the fact that one of the leading authorities, *Epsom Grand Stand Association* v. *Clarke* (24) was decided at a time when there was nothing in the statutory scheme that involved a choice between residential and business premises: and by the fact that, following that decision, s. 12, sub-s. 2, proviso (ii), of the Act of 1920 contained a legislative provision that the application of the Act to a house or part of a house is not to be excluded by reason only that part of it is used as a shop, office or for business purposes. The Kenya legislation contains no comparable provision.

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(20) [1921] 1 K. B. 541.

(21) [1922] 1 K. B. 325, 329.

(22) [1921] 2 K. B. 94.

(23) (1921) 38 T. L. R. 151; [1921] W. N. 356.

There remain two questions to which an answer must be given in order to dispose of this appeal. The first question is whether the appellant has shown that " alternative accommodation, reasonably equivalent as regards rent and suitability in all " respects, is available ". Their Lordships think that it would be wrong to decide against him on this point. Owing to the view that was shared by the courts in Africa as to the existence of " double protection ", no positive finding on this point is available. But there does not seem to have been any real controversy that, if by law the alternative accommodation to be considered was alternative residential accommodation and no more, the respondent had nothing to complain of. The President of the Appeal Court in fact speaks of " good residential alternative " accommodation " being " undoubtedly available ". It may seem curious at first sight that in considering what is an alternative " equivalent as regards suitability in all respects " it should be permissible to attend only to the residential aspect where the premises to be given up have been lawfully used both for residential and for business purposes. But this is a necessary consequence of the fact that the Ordinance protects a property, if a dwelling-house, as a dwelling-house, or, if business premises, as business premises. If it is as a dwelling-house that the property qualifies for protection, then it must be in respect of its suitability as dwelling accommodation that the alternative accommodation is to be regarded.

The last point is that raised by sub-s. 2 of s. 11. This subsection runs as follows:—" Nothing in this section contained shall " be deemed to permit a landlord to recover possession of a " dwelling-house if by such recovery he and his wife and/or " minor children would be in occupation of, or would acquire the " right to occupy, more than one dwelling-house at the same

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(24) (1919) 35 T. L. R. 525; [1919] W. N. 170.

"time". The trial judge expressed the view that this provision must constitute a bar to the appellant's action in any event. The Court of Appeal gave no decision on the point. It seems clear to their Lordships that, whatever its exact meaning may be, the provision has no application in this case. The word "dwelling-house" is given a special statutory meaning by s. 2 of the Ordinance, and there is no reason to suppose that it is used in any different sense in either of the contexts in which it appears in this sub-s. 2. On the contrary, everything points to its being used in the statutory sense. But the appellant's present living accommodation is not a "dwelling-house" in this sense, for it consists of some rooms in a factory of which he is himself the owner. This is not a "house or part of a house let as a separate "dwelling", for the statutory scheme has no concern with properties of which there is neither landlord nor tenant. Therefore an order for possession, if made in the present proceedings, could not amount to giving to the appellant the occupation of, or the right to occupy, more than one dwelling-house at a time.

Their Lordships do not think that, in view of this, it would be appropriate for them to try to give any general exposition of the meaning of this, perhaps ill-drafted, sub-section. It does seem an unavoidable conclusion that, if read according to the strict letter, it would be reduced to an absurdity. For it would confine the right to take proceedings for possession to the homeless man and the man who, like the appellant, happened to be in occupation of something that did not come within the statutory definition of a dwelling-house: and this, in face of the numerous and often weighty grounds for the resumption of possession which are listed in the various sub-headings of s. 11, sub-s. 1. It is difficult to suppose that such a consequence can have been what the makers of the Ordinance intended. Their Lordships have noted, however, what is said on this matter by the President of the Court of Appeal at the end of his judgment, and what has been said on a previous occasion in *Tara Singh* v. *Harnam Singh* (25), and they are anxious to say nothing that would discourage the courts in Africa from working out on the spot either a construction of the sub-section, if one is possible, that will not tie the courts too closely to a strict adherence to its letter, or a procedure (such, perhaps, as the suspension of orders for possession for periods that will allow landlords to bring themselves within the sub-section) that will rescue the enactment from the suspicion of patent absurdity.

(25) (1944) 11 E. A. C. A. 24.

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Their Lordships do not consider that it would be satisfactory for them to deal with the final question, whether, it being given, as they have found, that the appellant is in all other respects entitled to his order for possession, it would be "reasonable" to make such an order. That question ought to be dealt with in the Supreme Court of Kenya at Nairobi. But it is only fair to add that, when this question comes to be considered by a judge in that court, he should not, in their Lordships' opinion, take into account the circumstance that the alternative accommodation offered is not, or may not be, as convenient for the respondent's business as the premises themselves. Considering the situation of his adjoining property, hardly any other property could be. But to take that consideration into account on the question of reasonableness would be in reality to revive in another form the arguments as to double protection and equivalent suitability which have already been disposed of in this appeal.

For these reasons their Lordships will humbly advise His Majesty that the appeal be allowed and that (1.) the order of the Supreme Court dated November 5, 1948, dismissing the appellant's claim with costs, and (2.) the order of the Court of Appeal for Eastern Africa dated March 9, 1949, dismissing his appeal with costs, be reversed; that the proceedings be remitted to the Supreme Court in Kenya to be concluded on the basis of what has been said in this opinion, the Supreme Court to make an order for possession, if the court consider it reasonable so to do; and that the respondent should pay to the appellant his taxed costs of the appeal to the Court of Appeal for Eastern Africa and of the proceedings in the Supreme Court up to the present date. The respondent must pay the appellant's costs of this appeal.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; T. L. Wilson & Co.*

HANGKAM KWINGTONG WOO . . . APPELLANT;

AND

LIU LAN FONG *alias* LIU AH LAN . . RESPONDENT.

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July 23.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION).

Contract—War—Enemy occupied territory—Citizens in occupied territory and those who have escaped to allied territory not enemies—Power of attorney—Common law doctrine of illegality of trading with the enemy inapplicable—Contractual relations not abrogated—Frustration—Debtor and Creditor (Occupation Period) Ordinance, No. 24 *of* 1948, *s.* 11.

The appellant, who resided in Hong Kong, left there in 1942, during the Japanese occupation, which ended on September 1, 1945, and went to live in Free China—then in alliance with His Majesty—giving a person in Hong Kong a power of attorney conferring wide and general powers and specifically authorizing him to sell the appellant's real and personal property as he should think fit. In August, 1943, the appellant by his attorney entered into an agreement to sell to the respondent's husband certain real property in Hong Kong owned by the appellant. The purchase money was duly paid and certain documents executed, but in the absence of the requisite registration the sale was not completed. The purchaser died in May, 1946, and thereafter the respondent, his widow and executrix, brought the present action against the appellant, who had returned to Hong Kong in February, 1946, claiming specific performance of the agreement. The appellant pleaded, inter alia, that at all material times he and his attorney were divided by the line of war, and that therefore the power of attorney was cancelled or abrogated and he was not bound by the documents which the attorney purported to have executed on his behalf.

Held, bearing in mind that the law to be administered was that of Hong Kong, and assuming that the common law of England in regard to trading with the enemy prevailed in the Colony, that the question was what the common law of England was in the matter if England were itself enemy occupied territory. To ask that question was to plunge into the unknown, since the soil of England had not within the period of the development of the common law in this matter been occupied by the enemy. In those circumstances the problem was to be approached by examining the principle on which at common law trading with the enemy was held to be illegal. The common feature of every statement of that principle and its reason was that the person with whom intercourse was illegal was regarded as an enemy by the court which had to determine the illegality. The courts of enemy-occupied territory could not regard either one of its inhabitants who had left the territory or one who had stayed behind as an enemy of the King or of the other so as to make applicable the principle on which at common law trading with the enemy was held to be illegal. Accordingly, the court in enemy-occupied Hong Kong was not bound to hold that contractual relations were abrogated between its citizens who were temporarily divided by the line of war, and was right in the circumstances in decreeing specific performance of the agreement.

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD RADCLIFFE, and RINFRET, C.J. of Canada.

Li Tsz Chiu v. *Lo Kar Yam* (1948) 32 H. K. L. R. 121, 131, approved.

Tingley v. *Müller* [1917] 2 Ch. 144, considered.

Held, also, that performance of the agreement had not been frustrated by reason of the effect of the Debtor and Creditor (Occupation Period) Ordinance, 1948, of Hong Kong. While that Ordinance placed on the appellant a burden not contemplated by him at the date of the agreement, in that it rendered him liable to pay to mortgagees of the property a large sum in Hong Kong dollars beyond the military yen which he had already paid in purported full discharge of the mortgage debts, that could not be regarded as so fundamental as to strike at the root of the agreement and render its performance in the manner contemplated by the parties impossible.

Cricklewood Property and Investment Trust Ld. v. *Leighton's Investment Trust Ld.* [1945] A. C. 221, 228, applied.

Order of the Supreme Court of Hong Kong (Appellate Jurisdiction) (1949) 33 H. K. L. R. 113 affirmed.

APPEAL (No. 27 of 1950) from an order of the Supreme Court of Hong Kong (Appellate Jurisdiction) (June 10, 1949) confirming a judgment and order of the Supreme Court in its original jurisdiction (February 25, 1949) decreeing specific performance in favour of the respondent of an agreement for the sale of certain real property owned by the appellant.

The following statement of facts is taken from the judgment of the Judicial Committee:—Hong Kong was from December 25, 1941, until September 1, 1945, in the effective occupation and control of the Japanese, between whom and His Majesty a state of war existed. The appellant, who resided in Hong Kong and there carried on the business of a solicitor, was in the month of September, 1942, apprehensive of arrest by the Japanese and was minded to leave Hong Kong and go to Free China. With a view to the management of his affairs during his absence he gave to one Chan Hung Cheung (who will be called Chan) two powers of attorney, the one in English dated September 15, 1942, the other in Chinese. The English power of attorney gave to Chan

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wide and general powers, and specifically authorized him to sell the appellant's real and personal property as he should think fit.

On or about October 6, 1942, the appellant left Hong Kong and thereafter resided in Free China until the month of February, 1946, when he returned to Hong Kong. He was at the date of his departure from Hong Kong the owner of certain land and a messuage thereon known as 48 Kennedy Road. That property, which was registered in his name at the Land Office of Hong Kong as Inland Lot No. 2153, was subject to a first mortgage for an aggregate sum of 73,000 dollars Hong Kong currency and to a second mortgage for 30,000 dollars Hong Kong currency. By an order of May 10, 1943, which was effective from June 1, 1943, the Japanese authorities made " military yen " the only permissible currency in Hong Kong and forbade under heavy penalties the use of Hong Kong dollars which, before the occupation, were the recognized currency. The prescribed official rate of conversion was four Hong Kong dollars to one military yen.

In those circumstances the appellant by his attorney, Chan, on August 21, 1943, entered into an agreement with one Koo Wan Sing, who will be called " the purchaser ", for the sale to him of the said property in accordance with the law as proclaimed in Hong Kong at the price of 68,000 yen in military notes, of which 50,000 yen were expressed to be paid on the date thereof, and it was thereby agreed that the transaction should be put through within one month from that date, when the balance of the purchase money should be paid to the vendor, who should hand over all the title deeds of the predecessors and execute a formal deed of sale in favour of the purchaser. It was also agreed that the property was free of any mortgages, pledges or other incumbrances.

It was not disputed that under that agreement the purchaser was entitled to have the property assigned to him free of incumbrance, nor was it disputed that the balance of the purchase money was duly paid. Certain other documents were executed and acts done, to which reference must be presently made, but for the present purpose it was necessary only to add that the sale was not completed, that on May 25, 1946, the purchaser died, and that on May 24, 1948, the respondent as his executrix commenced the proceedings out of which this appeal arose. By her writ she claimed that she was the sole beneficial owner and entitled to possession of the said property, but by her statement of claim she alleged, and claimed specific performance of, the agreement which has been stated, and it was on the basis of that claim that the action proceeded and that this appeal had been brought.

The trial judge (Gibson, C.J.) gave judgment in favour of the respondent for specific performance, and, on appeal, his judgment was affirmed by the Full Court of the Supreme Court (Williams and Scholes, JJ.).

By s. 11 of the Debtor and Creditor (Occupation Period) Ordinance, No. 24 of 1948, of Hong Kong: " 11.—(1) In any case " where a debt purporting to have been discharged in whole or in " part by payment in occupation currency is by virtue of the " provisions of this Ordinance deemed to be wholly or partly " undischarged at the commencement of this Ordinance, and " where the payment of such debt before such purported discharge " as aforesaid was secured by any mortgage charge lien guarantee " indemnity or other form of security the rights of the creditor " in relation to such mortgage charge lien guarantee indemnity or " other form of security shall be deemed not to have been extin" guished or diminished by such purported discharge ".

1951. June 12, 13 and 14. *Sir Roland Burrows, K.C.*, and *A. J. Belsham* for the appellant. The main questions raised by this appeal are, first, whether the power of attorney remained valid and the powers thereby conferred remained exercisable at a time when the appellant and the attorney were separated by the line of war; and secondly, if so, whether the agreement for the sale of the appellant's property ceased to be binding on him on the coming into force of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

On the first point, no relevant Ordinance governing the matter exists in Hong Kong, and it is submitted that the principles of the common law of England are applicable and that thereby during the Japanese occupation of Hong Kong the residents of Hong Kong became enemies of His Majesty and his allies and were shut off from communication and intercourse and commercial dealing with those resident in His Majesty's free territories or in the unoccupied territory of any ally of His Majesty; and that in particular in the present case the relationship of principal and agent between the appellant and the attorney was determined so soon as they were divided by the line of war, and accordingly the agreement of August 21, 1943, and all other acts done by the attorney and documents executed by him in purported exercise of powers conferred by the power of attorney were not the acts of, or binding on, the appellant.

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There are only a few cases on power of attorney, and in any event it is only a form of agency. On this first point the present case is really an appeal against another decision of the Full Court in Hong Kong, *Li Tsz Chiu* v. *Lo Kar Yam* (1), by which the Supreme Court in the present case held itself bound.

In *Li Tsz Chiu's* case (1) the court in effect applied the principle in *Tingley* v. *Müller* (2), where it was held that an irrevocable power of attorney to sell lands and give receipts for the purchase money was not avoided by the donor of the power subsequently becoming an alien enemy. In that case it was an agency agreement for a particular purpose, and the case was an exception to the general rule. Here Chan, the attorney, was appointed to carry out all the appellant's business in Hong Kong.

That *Tingley's* case (2) is to be regarded as "an exception to "the general rule" appears clearly from dicta in *Sovfracht* (*V/O*) v. *Van Udens Scheepvaart En Agentuur Maatschappij* (*N.V. Gebr*) (3), where Viscount Simon, L.C., said that "it is, of "course, common ground that an 'alien enemy' cannot sue in "the King's courts or otherwise take up the position of an actor "in British litigation save under royal licence. An alien enemy, "in this connexion, does not mean a subject of a State at war "with this country, but a person, of whatever nationality, who "is carrying on business in, or is voluntarily resident in, the "enemy's country"; see also *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.* (4).

The general rule is indicated in *Robson* v. *Premier Oil and Pipe Line Co. Ld.* (5), where it was said that all intercourse which could tend to the detriment of this country or to advantage of the enemy, whether commercial or not, was inconsistent with the state of war between the two countries and therefore forbidden. In that case it was held that an alien enemy was not, during a state of war, entitled to exercise a right of voting in respect of shares in an English company, and a similar point arose in *In re Anglo-International Bank Ld.* (6), where it was said, dealing with the common law position, that shareholders whose registered addresses were in enemy territory must for the purposes of that case be regarded as alien enemies "whatever their nationality". [Reference was also made to *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag* (7).]

(1) (1948) 32 H. K. L. R. 121, 131.
(2) [1917] 2 Ch. 144.
(3) [1943] A. C. 203, 209, 250, 254.
(4) [1943] A. C. 32, 35.
(5) [1915] 2 Ch. 124, 136.
(6) [1943] Ch. 233, 238.
(7) [1946] A. C. 219.

It is submitted that *Tingley* v. *Müller* (7a) was wrongly decided, or is clearly distinguishable from the facts of the present case; it is in any event an exceptional case and one which ought not to be extended. There is here a contract of agency—a power of attorney involving the management of business affairs—which became void when the parties were separated by the line of war.

Assuming that the power of attorney was valid and the agreement lawfully entered into, it is submitted, on the second point, that whether or not there was an implied term in the agreement that the mortgages on the property should be discharged out of the purchase money, the change of circumstances effected by the Debtor and Creditor (Occupation Period) Ordinance, 1948, was so fundamental as to be outside the contemplation of the parties to the agreement and to frustrate it or to render its performance in the manner contemplated by the parties impossible. Further, to compel the appellant specifically to perform the agreement would, having regard to that change of circumstances, result in grave hardship to him: Fry on Specific Performance of Contracts, 6th ed., paras. 418, 421, 425. Reliance is also placed on the statement in *Baily* v. *De Crespigny* (8) that "people in general "must always be considered as contracting with reference to the "law as existing at the time of the contract". The Ordinance of 1948 did not exist at the time of the contract.

Sir Andrew Clark, K.C., and *Harold Lightman* for the respondent. This appeal divides itself into three main points. (A) Whether the power of attorney became voided when the appellant left Hong Kong and went to Free China. The decision of the Full Court in *Li Tsz Chiu's* case (9) is right. Alternatively, even if the English cases apply, a power of attorney of this sort given under these circumstances would not be void. (B) Whether, if the power of attorney is valid, the contract was frustrated; it is submitted that it was not. (C) There is no hardship in this case.

With regard to (A), none of the English authorities can apply at all until it is found that in the eyes of the law of the country where the property in question is situated somebody is an alien enemy. In this case the principal had gone to Free China, and vis-à-vis the people remaining in Hong Kong he was not, contrary to the contention of the appellant, an alien enemy, but a friend. The test is, does the transaction involve two-way intercourse with the enemy? It cannot be said that the appellant was an alien enemy, and none of the cases about trading with the enemy has

(7a) [1917] 2 Ch. 144.

(8) (1869) L. R. 4 Q. B. 180, 186.

(9) 32 H. K. L. R. 121.

anything to do with this case. Oppenheim's International Law, 5th ed., vol. 2, p. 356, para. 172, Wheaton's International Law, 7th ed., p. 244, and McNair on Legal Effects of War, 3rd ed., p. 336, support the submission that all transactions carried out in enemy-occupied territory during the occupation in accordance with the common law in England as running in the occupied territory will be approved after the occupation has terminated.

What has to be looked at is the legal position in Hong Kong, and what would be Hong Kong law as to the validity of the power of attorney in this particular case and as to any transaction carried out under the power. The first point is that there is nothing in the common law of England, which applies in Hong Kong, which would prohibit the transaction, since the question of trading with the enemy does not arise. In Wheaton's International Law, 7th ed., it is said, at p. 131, that " the law of nations prohibits " all intercourse between the subjects of the two belligerents " which is inconsistent with the state of war between their " countries ", but when all the transactions take place wholly inside occupied territory no question of trading with the enemy can arise.

The law of Hong Kong has to be applied, and the only change is that the appellant, who gave the power of attorney, is now in Free China instead of being in Hong Kong in occupied territory. Applying the Hong Kong law in those circumstances there is no objection to the power of attorney: it was admittedly valid in Hong Kong, and it was not invalidated by the appellant leaving the Colony. Take, for example, the case of two Dutchmen when Holland was occupied by the Germans, and one escaped to England after giving the other a power of attorney, then the people being Dutch, the power having been given in Holland and in respect of property in Holland, the courts in this country in determining the validity or otherwise of the power of attorney would apply the law of Holland. It is stated in Oppenheim's International Law, 5th ed., vol. 2, p. 268, that " upon a contract " of tenancy a landlord resident in England was allowed to recover " in an English court from his alien enemy tenant (in the terri- " torial sense) rent which accrued due to him during the war ". That there is no benefit to the enemy is the basis of the matter: *Halsey* v. *Lowenfeld* (10).

Secondly, to look at the matter from the outside point of view, the whole object of granting the power of attorney is to avoid the necessity of intercourse with the enemy. All that remained to be done was for Chan to act under the power in Hong Kong, and all the acts which he did took place, and could only take place, within occupied territory. There was therefore no intercourse involved at all. It did not involve any communication by the appellant or Chan; the only possible communication was by Chan transmitting money to the appellant. There is no objection to moneys coming out of enemy-occupied territory, because that is to the benefit of His Majesty and must be to the detriment of the enemy. In that respect the case is wholly different from *Tingley* v. *Müller* (11), which, even if wrongly decided, would not touch this case because it was the other way round. It was said in *Tingley's* case (11) that "the result of the cases . . . "seems to be that in order to determine whether a contract such "as this with an alien enemy is illegal and void it is necessary "to answer the following questions: (a) does the contract involve "intercourse with an alien enemy? (b) would it tend if valid to "the detriment of this country or to the advantage of the enemy? "(c) is it against public policy?" Those are the relevant questions, and in the present case the transaction would not tend to the detriment of this country because the only result would be that money would pass out of the occupied territory into Free China. As to the advantage to the enemy, he already had the property in Hong Kong under his power; it could be requisitioned. The power of attorney was validly granted; it was not revoked when the appellant left Hong Kong, and the agreement entered into, and the transactions carried out under it, were all valid transactions.

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(10) [1916] 2 K. B. 707, 716.

Passing to the second question, whether if the contract was validly executed, it was frustrated, the doctrine of frustration can only apply where impossibility of performance is found: *Cricklewood Property and Investment Trust Ld.* v. *Leighton's Investment Trust Ld.* (12). It was never impossible to perform the present agreement in accordance with its terms. Next, in this case there was no hardship at all, and for three reasons: first, the appellant sold the property in Hong Kong when it was in enemy occupation and when it must have been almost impossible to sell property there; secondly, he sold it for the best price he could obtain under the circumstances then prevailing; and thirdly, he was able to get money in China as the result of the sale, when he needed it there. The only case in which any

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(11) [1917] 2 Ch. 144, 186.

(12) [1945] A. C. 221, 245.

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possible hardship could be made out is in respect of the effect of the Ordinance of 1948 enacted after the occupation was over, and providing that the obligations should be revalued. That clearly was a hardship, and the only question is on whom it falls.

Sir Roland Burrows, K.C., in reply. A British subject in the position of the appellant was bound to have no intercourse with Hong Kong. In Free China he was in the position of being an enemy vis-à-vis Chan in Hong Kong. It has never been suggested that transactions between persons in occupied territory are invalid—they are between two persons in the same category. The position of territory occupied by an enemy was considered by Lord Wright in the *Sovfracht* case (13). The law of Hong Kong must recognize such consequences as flow from the Japanese occupation of Hong Kong.

July 23. The judgment of their Lordships was delivered by LORD SIMONDS, who stated the facts set out above and continued: The first defence to the claim is that at all material times the appellant and Chan were divided by the line of war, the appellant being in Free China, then in alliance with His Majesty, and Chan being in enemy-occupied territory, and that therefore the power of attorney was cancelled or abrogated and the appellant was not bound by documents which Chan purported to have executed on his behalf. On this interesting and difficult question their Lordships have not the advantage of a judgment of the Supreme Court in this case, for that court rightly considered itself bound by its own previous decision in Appeal No. 12 of 1948, to which reference will be made.

The argument for the appellant is thus stated in his formal case. It is that no relevant ordinance dealing with the matter existed in Hong Kong, and that the principles of the common law of England were applicable and thereby during the Japanese occupation of Hong Kong the residents of Hong Kong became enemies of His Majesty and his allies and were shut off from communication and commercial dealings with those resident in His Majesty's free territories or in the unoccupied territory of an ally of His Majesty, and in particular the relationship of principal and agent between the appellant and Chan was determined as soon as they were divided by the line of war.

To this contention the respondent replies, first (relying on the authority of *Tingley* v. *Müller* (14)) that by the common law of

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(13) [1943] A. C. 203, 223.

(14) [1917] 2 Ch. 144.

England a general power of attorney given by a British subject residing within His Majesty's allegiance to one who is, or becomes, an enemy of His Majesty is not abrogated or avoided by the outbreak of war, and secondly, that there is no principle of the common law of Hong Kong, which the courts of Hong Kong administer, which constrains them to treat the residents of Hong Kong when that territory is in enemy occupation as for all purposes divided by the line of war from former residents who have escaped to some part of His Majesty's Dominions, or to the territory of an ally. This latter plea will first be examined by their Lordships, for in a certain event it will be unnecessary to express a final opinion on the former.

As has been said, the Supreme Court of Hong Kong rejected the contention of the appellant on the authority of its own previous decision in Appeal No. 12 of 1948, and it is convenient to examine that case in which Sir Leslie Gibson, C.J., delivered a valuable and penetrating judgment. The facts there, so far as they need to be stated, were that during the Japanese occupation of Hong Kong two members of a partnership which carried on business there escaped to Free China and the remaining members remained in Hong Kong and continued to carry on the partnership business. The partners were thus said to be divided by the line of war, and the question was whether from the time of such division the partnership was by the law of Hong Kong ipso facto dissolved.

The Chief Justice accepted the view that the Colony of Hong Kong was the victim of a Japanese occupation and not of a mere invasion, and he further, on a consideration of the authorities, agreed that according to the common law of England a partnership is automatically dissolved if at the outbreak of war one or more partners are in England and the other partner or partners are in enemy territory, which for this purpose includes enemy-occupied territory, and that the same principle applies if after the outbreak of war one or more partners go to enemy territory while the other partner or partners remain in England, and that residents in allied territory are on the same footing as residents in England for the purpose of these principles. " No doubt too ", said the Chief Justice, " the common law in so far as it forms " part of the law of Hong Kong would be similarly interpreted " here in ordinary times." " But ", he added, " the question " I have to ask myself is ' How would the common law—as part " ' of the law of Hong Kong—be interpreted in Hong Kong while " ' the Colony was under enemy occupation? ' "

After examining the basis of the principles which he had discussed, he says: " To support his argument that the partnership in this case was dissolved, Mr. Wright must go further, " and his further proposition is not supported by authority. He " must argue that under the law of Hong Kong (a) residents in " Hong Kong became enemies on the Japanese occupation of " Hong Kong, and (b) residents in Free China were therefore " unable to communicate with them or remain in contractual " relations with them. I am unable to accede to these propositions. The law of England regards occupied Hong Kong as " enemy territory, but it seems impossible to contemplate that " the law of Hong Kong itself (and Mr. Wright must rely on the " common law as forming part of the law of Hong Kong) could " operate to turn all the residents of the Colony into enemies. " Could it, for example, by turning them into enemies preclude " them from suing in their own courts? It might be that under " some law of the Japanese administration (no such law has been " established) the principle was applied in reverse on the basis " that Free China became the enemy, but in that case the result " would flow from the Japanese law and not from the common " law as in force in Hong Kong ". Their Lordships have thought it proper to set out these passages from the judgment of the Chief Justice at length because they appear to go to the heart of the matter.

It is constantly to be borne in mind that it is the law of Hong Kong which is to be administered, and the question therefore is: assuming that the common law of England in regard to trading with the enemy prevails in the Colony, what is the common law of England in this matter if England is itself enemy-occupied territory? To ask this question is to plunge into the unknown. But on the answer to it depends the issue what is the law of Hong Kong when Hong Kong is in enemy occupation. The researches of counsel on either side were unable to bring to their Lordships' notice any case-law or institutional writings which were of real assistance. This was perhaps inevitable, since the soil of England has not within the period of the development of the common law in this matter been occupied by the enemy. Nor, though the same problem must in recent times have arisen in occupied Europe, can it be said that such a universal rule has been evolved that it ought to be adopted as part of the municipal law of England or Hong Kong. In these circumstances it appears to their Lordships that the problem must be approached, and, if there is a solution, solved, by examining the principle on which at common law trading with the enemy is held to be illegal and, indeed, criminal, and then asking whether on that principle the courts of England (if England were occupied territory) or of Hong Kong, as in the present case, are bound to hold that contractual relations are abrogated between its citizens who are temporarily divided by the line of war. Their Lordships at this stage make no distinction between the relationship of partner to partner and of donor to donee of a power of attorney.

The basis of the principle is variously stated: their Lordships would refer to Professor McNair's treatise on Legal Effects of War, 3rd ed., p. 171 et seq., as containing an accurate and adequate exposition of this matter, and in the following observations borrow freely from it. In *The Hoop* (15) Lord Stowell could refer to the principle as "a general rule in the maritime jurisprudence of this country, by which all subject's trading with the public enemy, unless with the permission of the Sovereign, is interdicted"; while a few years later a learned American judge in *The Rapid* (16) could say: "The individuals who compose the belligerent States, exist, as to each other, in a state of utter occlusion. . . . Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country". Other reasons, too, were ascribed by Lord Stowell, as, e.g., the procedural disability, shared by enemies generally, which precluded an appeal to the tribunals of one country on the part of the subjects of the other, and "the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit" (17), an aspect of the matter which has frequently been emphasized in later authorities. And this is closely linked with the reasoning of Willes, J., in *Esposito* v. *Bowden* (18), who there founds the prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country on "the presumed object of war being as much to cripple the enemy's commerce as to capture his property".

But it is to be observed that the common feature of every statement of the principle and its reason is that the person with whom intercourse is illegal is regarded as an enemy by the court which has to determine the illegality. This is most clearly shown in connexion with the rule as to the procedural disability which attaches to enemies. At once the question arises, how this doctrine can be applied in the courts of an enemy-occupied country. To take the present case, whom were the courts of occupied Hong Kong to regard as an enemy, to whom deny persona standi in judicio? Presumably not to the appellant, who had escaped from the occupied territory and sought refuge amongst the King's allies: to him no taint of enemy character could attach. To Chan, then, the attorney, who remained in Hong Kong? But to whom, if not to Chan, were the courts of Hong Kong open? The result seems plainly to ensue that, whatever consequences may follow outside the occupied territory if one of its inhabitants, who has left it, seeks to maintain or to initiate relations with another who has stayed within it, yet the courts of that country cannot regard either him who has left or him who has stayed behind as enemies of the King or enemies of each other. This result may perhaps be tested thus. Suppose that the appellant had, instead of going to the territory of an ally, gone to Japan and thence sought to maintain some contractual relations with Chan. Then, apart from any regulation which the occupying Power might lawfully make, a court of Hong Kong would be bound to treat him as an enemy, to deny him access to its presence and to treat the contractual relation as determined. Is he then to be regarded as an enemy to whatever territory, British, allied or enemy, he goes?

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(15) (1799) 1 Ch. Rob. 196, 198.
(16) (1814) 8 Cranch 155.
(17) 1 Ch. Rob. 200.
(18) (1857) 7 E. & B. 763.

Enough has been said on this aspect of the case to show that there is a wide divergence between the problems which face the courts of a belligerent Power and of an occupied territory.

No less striking is the difference in the conditions which must determine whether a particular class of contract should be abrogated. The general grounds of abrogation are, broadly speaking, the danger of intercourse and the desire not to enhance, but to cripple, the resources of the enemy. Often it might be said of this or that communication or of this or that relationship that it could not possibly redound to the advantage of the enemy but rather must benefit this country: yet it is illegal and void, for it cannot be left to the individual to judge what may or may not be harmful or beneficial to his country.

Let it be assumed (contrary to the contention of the respondent) that such a relation is that which is established by the grant of a general power of attorney. Yet how different an aspect must such a transaction wear if it takes place in an occupied country. New considerations at once arise which had no place in the formulation of the general rule of law. Is it in the interest of

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the King that, when British territory is occupied by the enemy, its able-bodied or skilled inhabitants should escape across the line of war and continue to render him service? No one would deny it nor give little weight to such a consideration, remembering what is owed to those who, when Europe was overrun, thought it their duty to carry on the fight from English shores. If, for such men, that is their right, or, as some would say, their duty, does public policy demand that, doing it, they should leave their affairs unattended by any responsible agent lest it should be said that, placing them in the hands of a lawful attorney, they were guilty of illegality and crime? If it were so, it would be a powerful deterrent against them rendering the service to the King which they could usefully continue to render. Their Lordships do not think it necessary to assess the general advantage or disadvantage of endeavouring to apply in the courts of Hong Kong the rigid rules of the common law which might have to be applied outside the Colony in regard to a transaction taking place within it. The purpose of their observations is to show that the contentions of the appellant involve a grave extension of the common law, and that that extension means not merely the application of old principles to new circumstances or their adjustment to fresh needs, but the rewriting of them in conditions in which their foundations are shaken. In these circumstances their Lordships are of opinion that the judgment of the court of Hong Kong should be upheld.

It becomes unnecessary to determine whether a general power of attorney is an instrument of a kind which must in ordinary cases be regarded as abrogated when donor and donee are divided by the line of war. For, even if it is, it is not, as their Lordships hold, to be regarded as abrogated in the extraordinary case now under appeal. It is sufficient to say that *Tingley* v. *Müller* (19), on which the respondent strongly relied as authority for the proposition that such an instrument remains of full force and effect notwithstanding the division of war, is difficult to reconcile with later cases and has itself been the subject of criticism in the highest tribunal.

But in addition to the defence with which their Lordships have just dealt the appellant also raised two pleas which must now be considered: (1.) that by reason of certain events, which will next be mentioned, there was such a change of circumstances as to frustrate the agreement and render its performance in the manner contemplated by the parties impossible; and (2.) that, in any case, in view of the hardship which would be imposed on the appellant the equitable remedy of specific performance should be denied to the respondent.

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(19) [1917] 2 Ch. 144.

For the consideration of these pleas some further facts must be stated. As has already been noted, the property was subject to a first and second mortgage in sums expressed in terms of Hong Kong dollars. In September and October, 1943, these mortgages were paid off in military yen at the prescribed rate of exchange; it was not permissible to pay them off in any other currency. Thus, but for the passing of the Ordinance of 1948, to which reference will next be made, the way was clear for an assignment of the property free of incumbrances to which the purchaser was entitled. And, in fact, such an assignment was at some date towards the end of September, 1943, executed by Chan in favour of the purchaser. In this document the consideration was stated to be 272,000 Hong Kong dollars, a fact at one time relied on by the appellant but no longer relevant in view of the finding of fact by the Chief Justice that the agreement was for a sale for military yen and nothing else. This assignment was not, and for obvious reasons could not be, registered at the Land Office of Hong Kong.

In 1948 there was passed by the Hong Kong legislature the Debtor and Creditor (Occupation Period) Ordinance, 1948 (being Ordinance No. 24 of 1948). It is not necessary to refer at length to the terms of this Ordinance, and in particular it is not desirable, since the mortgagees are not parties to the proceedings, to attempt to define their rights under it against the appellant or the respondent or the property. But it is at least clear, as it is alleged by the appellant and made the ground of defence by him, that the result of the Ordinance is that, while it imposes on the purchaser no obligation to pay to the appellant any sum beyond the military yen already paid, yet it renders the latter liable to pay to the mortgagees a large sum in Hong Kong dollars beyond the military yen already paid in purported full discharge of the mortgage debts.

On these facts the appellant raises the plea of frustration, a plea rejected by the Chief Justice and by the Full Court on appeal. Their Lordships so fully agree with their reasons and conclusion that they can state their own view very shortly. It is beyond question that the passing of the Ordinance placed on the appellant a burden not contemplated by him or by the purchaser at the date of the agreement: this is put somewhat graphically by saying that, whereas it was contemplated that the mortgages would be fully discharged out of the purchase money and there would be a balance left over for the appellant, not only is there no balance left for him but he will lose his property and may still remain liable in substantial sums to the mortgagees. That this is an event not contemplated by him or his attorney is certain, though there is no evidence that the purchaser was aware that the property was mortgaged. But the question is whether this change of fortune is to be regarded as so fundamental as to strike at the root of the agreement and render its performance in the manner contemplated by the parties impossible. In their Lordships' opinion it clearly is not. The purchaser has long since fulfilled his part of the agreement: the appellant as vendor can fulfil his part by the execution of a single document. It is therefore not a case where performance has become impossible. Nor, if as the result of the Ordinance the appellant has not obtained the advantage from the agreement that he had expected, can this be deemed a change of circumstances so fundamental as to satisfy the test laid down by Viscount Simon in *Cricklewood Property and Investment Trust Ld.* v. *Leighton's Investment Trust Ld.* (20), which test was, as their Lordships think, correctly applied by the Supreme Court of Hong Kong.

The final plea, with which their Lordships must deal, is that equitable relief should be refused on the ground of hardship to the appellant. The Full Court cited with approval that part of the judgment of the Chief Justice which dealt with this plea and, as their Lordships respectfully think, his reasoning and conclusion are unimpeachable. That the appellant in the events that happened made a bad bargain is clear enough. That resulted from the fact that the Hong Kong legislature deliberately enacted that in some cases there should, and in others there should not, be a revaluation of debts incurred or discharged in military yen. The appellant would have been in no better position if the transaction of sale had been fully performed before the Ordinance came into operation. It does not appear to their Lordships that any good reason has been shown why the court should, by denying to the purchaser, who has performed his part of the bargain, the appropriate remedy of specific performance, in effect add to or alter the carefully thought out provisions of the Ordinance for the adjustment of the rights of certain creditors and debtors. In their Lordships' opinion, therefore, this plea also fails, and they would only add that in any case they would hesitate long before

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(20) [1945] A. C. 221, 228.

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interfering with the exercise of a discretionary jurisdiction by the Chief Justice in which the Full Court concurred.

They will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Reid Sharman & Co.; Sharpe, Pritchard & Co.*

H. L. (E.)*

1951
Feb. 27, 28:
May 9.

[HOUSE OF LORDS.]

CROWTHER . . . . APPELLANT;

AND

CROWTHER . . . . RESPONDENT.

Husband and Wife—Divorce—Desertion—Insanity following desertion —Effect—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

Where a divorce is sought on the ground of desertion and in the course of the three years' period immediately preceding the filing of the petition the respondent is admitted to a mental home under the Lunacy and Mental Treatment Acts, 1890–1930, there is not an irrebuttable presumption that the desertion has been terminated and the petitioner is entitled to produce evidence that the respondent remained mentally capable of an intention to desert.

Per Lord Porter, Lord Normand, Lord MacDermott and Lord Reid: If it is not established by the petitioner that the respondent remained mentally capable of an intention to desert, or if no evidence is called, it is not open to the court to draw an inference of continued desertion from the intention displayed before and after the certification period.

Per Lord Oaksey: Once the original desertion is established the onus of proof is shifted to the deserting spouse to prove an intention to resume cohabitation.

Williams v. *Williams* [1939] P. 365 disapproved.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal (Bucknill, Somervell and Denning, L.JJ.).

On July 20, 1949, the appellant, Mrs. Crowther (hereinafter called "the wife"), filed a petition for divorce from her husband, the respondent, on the ground of desertion. The desertion was said to have begun on June 26, 1946. The husband, by para. 2 of his answer, denied that on that date he left his wife, but admitted doing so on July 8, 1946, alleging that he had just cause for so doing. By para. 3 he pleaded that if, contrary to his contention, he did desert her, the desertion was terminated on July 28, 1948, when he was admitted to Banstead Hospital under a reception order of that date made under the Lunacy and Mental Treatment Acts, 1890–1930, and was there detained until October 11, 1948, as a person of unsound mind. The existence of the reception order was admitted.

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* *Present*: LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD MACDERMOTT and LORD REID.

At the hearing of the petition it was contended for the husband that there was an irrebutable presumption that a person certified as of unsound mind was incapable of any such mental or moral activity as would show an intention to continue to desert and that any period of desertion was wholly interrupted by the certification. Ormerod, J., upheld this contention. The Court of Appeal having affirmed his decision, the wife appealed to the House of Lords.

Middleton, K.C., and *Temple, K.C.*, for the appellant wife. *Williams* v. *Williams* (1), where it was held that certification ends desertion, was wrongly decided. It is the date of the inception of the desertion and not of its continuance that is the only material time to consider on the question of intention to desert: see *Thompson* v. *Thompson* (2) and *Townsend* v. *Townsend* (3).

Jones v. *Newtown and Llanidloes Guardians* (4) is a decision on a different statute and on different facts. The judgment may be correct, though the phraseology may be criticized. A husband is only obliged to support his wife in his home and if she deserts him he is not obliged to support her somewhere else. But if lunacy supervenes she becomes subject to the Lunacy Acts and he must maintain her in the asylum, since then he must maintain her whether in his home or in any other place to which she may be relegated: see Lunacy Act, 1890, s. 296.

Certification on insanity has no effect on the intention to desert, for an insane person has no mind capable of changing the intention to desert. Therefore the intention, once it is formed and the spouse has withdrawn himself, continues until something is done by the deserting spouse to end it, and affirmative proof of a continuing intention to desert during the whole period is unnecessary. Desertion, once begun, can continue without the animus deserendi necessary for its inception; this is an essential distinction between the initial act of desertion and the state of desertion which follows: see *Monckton* v. *Monckton* (5). This accords with the view that a person of unsound mind cannot change his domicile: see Dicey on Conflict of Laws (6th ed.), p. 119. Domicile requires the fact of residence and the intention to remain, intention being all important. But if a person acquires a domicile other than his domicile of origin insanity does not bring about a revival of the domicile of origin.

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(1) [1939] P. 365.
(2) (1858) 1 Sw. & T. 231.
(3) (1873) L. R. 3 P. & M. 129.
(4) [1920] 3 K. B. 381.

The meaning of s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 2 of the Matrimonial Causes Act, 1937, is that proof must be given that the spouse has committed an act of desertion and has continued in that state of desertion for three years immediately preceding the presentation of the petition. Intention is a necessary factor at the inception of the desertion, but once that is established to the satisfaction of the court, the desertion continues until it is terminated by some act of the deserting spouse. The onus is on the deserting spouse to show that the desertion has been terminated by some act of his own, because the whole point is his intention, and until he shows that his intention has changed the desertion necessarily continues. The quality of the act is all important as regards the act of desertion; the desertion is important as regards its continuance. If a man who has left his wife, intending to desert her, adopts an animus revertendi but does nothing more, and shilly-shallies about actually returning he is still in a state of desertion because he has not done anything to complete the animus revertendi. He can only end the state of desertion by showing an intention to return and, if there is nothing to prevent him from doing so, by actually returning or by making a genuine offer to return, which is rebuffed. In the present case, for a period of three months the husband was physically prevented from returning, but either before or after it he could have done so; in fact he did not.

Desertion without cause is a question of fact dependent on all the facts and may be inferred from those facts. If affirmative proof of a continuing intention to desert over the whole period is necessary the mere proof of reception into a mental hospital under a reception order is not conclusive evidence of inability to have

(5) [1942] P. 28, 32.

that intention. It does not necessarily mean that the patient is incapable of that intention, for the certificate has nothing to do with that. The wife in this case is entitled to produce evidence as to her husband's state of mind and to show that in fact while in the mental hospital he was capable of maintaining the animus deserendi and did maintain it. Medical evidence might establish that, though unable to form an intention on some matters, he was capable of doing so lucidly on others. The question whether or not he could continue to maintain the intention to desert throughout that time cannot be determined without evidence.

Williams v. *Williams* (6) cannot be rightly decided. If it stands it will be sufficient for a deserting spouse to be knocked down and to sustain concussion in the last three days of the three years' period to destroy the animus deserendi. Similarly, a short attack of epilepsy would be enough. The logical conclusion from it is that since everyone goes to sleep at night, that would constitute a break in the intention.

[They also referred to *Rushbrook* v. *Rushbrook* (7); *Drew* v. *Drew* (8); *Pratt* v. *Pratt* (9); *Bowron* v. *Bowron* (10); *Cohen* v. *Cohen* (11); *Green* v. *Green* (12); Rayden on Divorce (5th ed.), p. 118 (sec. 130), and the Limitation Act, 1939, s. 31, sub-ss. 2 and 3.]

Temple, K.C., following. *Brown* v. *Brown* (13) is an authority in the wife's favour. In a matrimonial case it is open to either party to show that the respondent is or is not capable of forming the relevant intent: see *White* v. *White* (14). That is what *Williams* v. *Williams* (15) does not allow to be done. There is an analogy in the wife's favour in cases of cruelty, since the acts in question may be relied on if they cause danger to health and it is not necessary to prove malignancy: see *Squire* v. *Squire* (16).

Ormrod for the respondent husband. Two questions arise in the present case: (a) whether insanity of any degree can stop the period of desertion running once it has started, and (b) whether a reception order is conclusive evidence of incapacity to have an intention to desert or to be in a state of desertion.

As to the first point, *Williams* v. *Williams* (15) was rightly decided, and a person who is subject to a reception order cannot

(6) [1939] P. 365.
(7) [1940] P. 24.
(8) (1888) 13 P. D. 97.
(9) [1939] A. C. 417, 420, 427–8.
(10) [1925] P. 187, 194.
(11) [1940] A. C. 631, 645.
(12) [1946] P. 112.
(13) [1947] P. 95.
(14) (1859) 1 Sw. & T. 591.
(15) [1939] P. 365.
(16) [1948] L. J. R. 1345.

in law have any intention of any kind, whether an animus deserendi or an animus revertendi, so long as he is suffering from such a degree of unsoundness of mind as to be a proper person to be detained. Desertion is a continuous state involving animus deserendi as well as absence in fact. Accordingly in the present case on the admitted facts the wife cannot prove that the husband has deserted her without just cause for the requisite period, since, though there was withdrawal from consortium, there was no continuous animus deserendi. If it is either proved or presumed that he is incapable of that intention that is a complete defence.

It would be artificial to hold that a person completely insane can have any intention to desert. By contrast, making a will and contracting a marriage are essentially isolated acts capable of being performed in a lucid interval, whereas desertion is a continuum. The Limitation Act, 1939, s. 22, and s. 31, sub-ss. 2 and 3, indicate that the mere making of a reception order is enough to prevent time running against the patient. Under the Rules of the Supreme Court a person in the condition of the respondent husband requires a guardian ad litem. He cannot himself instruct a solicitor: see *Yonge* v. *Toynbee* (17); see also the Lunacy Act, 1890, ss. 4, 16 and 120.

The effect of a reception order is to give the court power to step in and take over the whole of the affairs of the person in question. It is a very serious document, a judicial, or at least a quasi-judicial, act, and when such far-reaching civil disabilities flow from it the reasonable inference is that he cannot deal with his matrimonial affairs, and must be presumed to be incapable of forming any reasoned judgment on them. The House should apply and, if necessary, extend the principle of the Lunacy Acts. No help can be obtained from contract cases because they depend on a different principle and on the knowledge of the other party to the contract. [He referred to *Pratt* v. *Pratt* (18) and *Prinsep* v. *Dyce Sombre* (19).]

If *Williams* v. *Williams* (20) is not followed, then the principle enunciated by Bucknill, J., in *Bennett* v. *Bennett* (21) should be followed, and it should be held that a reception order raises a prima facie presumption of incapacity in the patient to have the intention necessary for continued desertion. The test to be applied in that case in ascertaining whether the patient continued to have an animus deserendi is that of Bucknill, J.—the capacity to form a reasoned judgment about his matrimonial affairs. The prima facie presumption of incapacity stands until it is disproved. If there are any departments in the patient's mind which are capable of making sound judgments the onus is on those asserting this to prove it. Thus, though once desertion is proved the onus is on the deserting spouse to establish that the animus deserendi has ceased, once he is admitted to a mental hospital that fact is evidence of there being no intention any longer to desert unless it is disproved. A judge cannot go behind a reception order without some evidence to the contrary.

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(17) [1910] 1 K. B. 215.
(18) [1939] A. C. 417.
(19) (1856) 10 Moo. P. C. 232, 244–5.
(20) [1939] P. 365.
(21) [1939] P. 274, 279.

Middleton, K.C., in reply. On the question of intention one may apply the observation of Bowen, L.J., in *Edgington* v. *Fitzmaurice* (22) that "the state of a man's mind is as much a fact "as the state of his digestion". It must accordingly be open to the appellant wife to prove by evidence the state of her husband's mind during the period of the reception order.

Consortium must be maintained by both spouses unless an offence by one of them excuses the duty on the part of the other. Once the duty is imposed by law it cannot be evaded without lawful justification. (See the words "without cause" in the new s. 176 of the Act of 1925.) Once the fact of repudiation of consortium is established the offence of desertion is complete. At the inception of the desertion the animus deserendi is absolutely necessary, but thereafter to put an end to the desertion there must be some active step by the deserting spouse. A deserting spouse who has been subsequently imprisoned may write from prison that he wishes to return to his wife, but this cannot avail him because he has put himself in a position where he cannot terminate the desertion by returning. If desertion has taken place the husband remains under a continuing liability to correct his fault and return to his wife, and if he does not do so he remains in a state of desertion. The Lunacy Acts do not put a stop to his duty to supply her with necessaries (see also *Read* v. *Legard* (23) *per* Alderson, B.) and there is no reason why it should end the duty of consortium. The onus still remains on the deserting party, though insane, to prove that the desertion has been terminated.

Their Lordships took time for consideration.

(22) (1885) 29 Ch. D. 459, 483.

(23) (1851) 6 Ex. 636, 642.

May 9. LORD PORTER. My Lords, this is an appeal from a judgment of the Court of Appeal affirming a decision of Ormerod, J., in a matrimonial matter.

On July 20, 1949, the petitioner, Mrs. Crowther, filed a petition for divorce against her husband on the ground of desertion. The desertion was said to have begun on June 26, 1946. The date was denied but as it was admitted that the husband deserted his wife on July 8, the exact date is immaterial, provided that she is able to establish, in accordance with the provisions of s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 2 of the Matrimonial Causes Act, 1937, that the desertion was " without cause " and continued for " at " least three years immediately preceding the presentation of the " petition ". In answer it was alleged that the desertion was terminated on July 28, 1948, when the respondent was admitted to Banstead Hospital under a reception order of that date made under the Lunacy and Mental Treatment Acts, 1890 to 1930, and was there detained until October 11, 1948, as a person of unsound mind. The existence of the reception order is admitted and the only question, therefore, which your Lordships have to determine is whether it presents an absolute bar to the prayer of the petition.

It is said on the one hand that desertion is a continuous process involving on the part of the deserting spouse an animus deserendi as well as absence in fact: that in the present case there was a withdrawal of consortium but no animus deserendi for three years inasmuch as during the period of his detention the husband was a certified lunatic and, it was said, as such, incapable of forming or retaining an animus.

To this plea various answers were made:—(1.) That the only material time to consider on the question of intention is that at which desertion in fact took place. (2.) That in any case the husband, having formed the intention and withdrawn himself, could only put an end to his desertion by some action showing an intention to return and by returning if there was nothing to prevent his doing so. It may be that the husband was physically prevented from returning for some three months, but before and after that time he could have come back and could have endeavoured to take up his matrimonial position again, whereas he had never attempted to do so. (3.) Furthermore, it was maintained that the certification was not conclusive: medical evidence might establish that though unable to form any intention in some matters, he might be capable of a lucid determination on others and that whether during his incarceration he could continue to maintain an intention to desert could not be determined without such evidence.

The judge took the view that the existence of the certificate was an absolute bar to the grant of the prayer in the petition. The certificate, in his opinion, established that the husband was, during the time that he was detained, incapable of forming or retaining any intention of deserting: desertion was a continuing state requiring proof that the husband left with the intention of remaining absent and continued to retain that intention. It could not exist in the absence of a capacity to form a determination. Nor, as he thought, could any evidence alter the inference which must be drawn and, therefore, the respondent was not in desertion for the necessary three years whether immediately preceding the petition or indeed for three full years.

In my view he was obliged to reach this conclusion having regard to the decision of the Court of Appeal in *Williams* v. *Williams* (24). No doubt a distinction in fact can be drawn between the two cases, since in *Williams* v. *Williams* (24) the husband was still under restraint when the petition was presented and heard, so that if certification involves an inability to form a resolve, the husband was unable either to resolve to stay away or determine the desertion at the time of the hearing, whereas, in the present case the respondent had recovered, been released for some seven months, and, as it seems, neither returned to his wife nor evinced any inclination to do so.

But any such distinction is inadmissible having regard to the opinion expressed by the Master of the Rolls, with whom Finlay, L.J., agreed. He says (25) that "there is" in a certified lunatic, "generally speaking, no capacity to have the "animus [of returning] or to give to it the quality of volition "required to produce a legal result. . . . I thought at one time "that the court might be at liberty, upon the facts of the particular case, to draw an inference as to what the conduct of "the lunatic would have been, if he or she had remained of "sound mind. If it were permissible to draw such an inference, "the question whether in any particular case it ought to be "drawn would not present any insuperable difficulty. But I do "not think that this is a permissible solution. What must be "proved is desertion for the necessary period. If I am right in "what I have said as to the necessity of the animus deserendi

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(24) [1939] P. 365.

(25) Ibid. 370.

"and the impossibility of its existence in the case of a person "who by reason of lunacy is incapable of having it, that proof "can never be given". It is true that MacKinnon, L.J., was inclined to think that long continued desertion, even if followed by lunacy before the presentation of the petition, might enable a court to draw the inference that the intention persisted to the end and might have taken an even stronger view in a case where a husband, after his mental stability was restored, still continued to remain absent; but he was in a minority and the other view prevailed. The case was originally heard by Langton, J., who later followed his own view and that of the Court of Appeal in *Rushbrook* v. *Rushbrook* (26).

On the other hand, it has been held that physical inability to end the desertion does not prevent its remaining desertion, e.g., *Drew* v. *Drew* (27), where the husband was in prison. This result has however been explained on the ground that the deserting spouse might form an intention to return, express his intention and take such steps as are open to an imprisoned person to carry out the resolve. *Drew's* case, it is said, depends on physical incapacity not on intention.

I get little assistance from the other cases which were quoted to your Lordships and, like Bucknill, L.J., can find no support for either side in *Cohen* v. *Cohen* (28), nor, indeed, from *Bowron* v. *Bowron* (29), which decides that desertion, if there be an original intention to desert, continues until it is brought to an end but does not help to a conclusion whether certification as a lunatic ipso facto brings about that result, any more than do Lord Macmillan's words in *Pratt* v. *Pratt* (30): "The deserting "spouse must be shown to have persisted in the intention to "desert throughout the whole period". There are, however, two cases which require careful consideration. The first is *Jones* v. *Newtown and Llanidloes Guardians* (31). In that case a wife had left her husband without any legal justification and later became a lunatic. The question was whether the husband or the guardians were liable to maintain her. It was held that the obligation rested upon the husband. In the course of his judgment Lord Reading, C.J., said (32): "Here the wife has become "a lunatic and continues to be insane. She is therefore unable "to exercise any judgment. She cannot elect to return home".

(26) [1940] P. 24.
(27) (1888) 13 P. D. 97.
(28) [1940] A. C. 631.
(29) [1925] P. 187.
(30) [1939] A. C. 417, 420.
(31) [1920] 3 K. B. 381.
(32) Ibid. 384–5.

And Shearman, J., used words to the like effect (33): "Here, "she might have returned to her husband and called upon him "to maintain her at any time before she became insane. Upon "her becoming insane her freedom of will came to an end, her "absence from her home ceased to be wilful, with the consequence that her husband's obligation to maintain her revived".

Those expressions, however, weighty as they are, were used in reference to another Act and a different set of circumstances and their import as such may be confined to the law and facts of the particular case in which the physical inability to return was of more importance. They would not in any circumstances bind your Lordships. Still less assistance is, to my mind, to be obtained from the decision in *Yonge* v. *Toynbee* (34), in which certain solicitors were ordered to pay the costs of litigation which they had continued on behalf of a madman but without knowledge of his state. In that case his incapacity was accepted as withdrawing the solicitors' authority to act for him.

The other case is a decision of Bucknill, L.J., himself, when Bucknill, J., viz.: *Bennett* v. *Bennett* (35), reported in the same volume in which *Williams* v. *Williams* (36) afterwards appears. In the course of his judgment he suggests (37) that the question in issue is: "Did the wife during the time she was insane intend "to desert her husband?" and puts as a possible answer that it may be that no irrebuttable presumption exists, but adds that the wife's insanity raises a rebuttable presumption that the wife's desertion had come to an end and accordingly the deserted spouse may prove, if he can, that she was capable of retaining an intention to desert and did retain that intention.

My Lords, I agree with this view, which, as I understand, the learned Lord Justice only discarded in the present case because he was bound by the subsequent case of *Williams* v. *Williams* (36). I see no reason for imputing an irrebuttable inability on the part of a husband, who has been the subject of certification, to form an intention or to keep it. Persons abnormal in some respects may be normal in others and evidence alone can solve the question in which category the individual is to be placed. A lunatic is capable of making a will in a lucid interval, and though a continuous intention is harder to establish, I cannot regard it as impossible. I am not prepared to go further and to say that desertion continues where the deserting spouse is a lunatic because a lunatic cannot form an opposite intention, or even that an animus deserendi, formed before the lunacy and a continuance of physical desertion after it has come to an end, admits a legitimate inference without further evidence that the intention to desert continues during the intermediate period when he was a lunatic.

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(33) [1920] 3 K. B. 381, 385–6.
(34) [1910] 1 K. B. 215.
(35) [1939] P. 274.
(36) Ibid. 365.
(37) Ibid. 278.

If in fact a petitioner is unsuccessful in proving that the lunatic was capable of forming an intention, or if no evidence is called, in my opinion the court is not entitled to draw an inference of continued desertion from the intention shown in the pre- and post-certification periods.

In accordance with these views I would allow the appeal and send the case back in order that evidence, if offered, may be received and a conclusion reached in conformity with the principles set out above.

LORD NORMAND. My Lords, I agree with the opinion which has been delivered by my noble and learned friend on the woolsack. I have had the advantage of reading in print the opinion which will be delivered by my noble and learned friend Lord Reid and I concur also with it.

LORD OAKSEY. My Lords, the question in this appeal is whether the detention of the respondent in a mental institution for some months during the period of three years immediately preceding the filing of the appellant's petition for divorce on the ground of the respondent's desertion makes it impossible to grant the divorce, secondly whether, if not, the onus is upon the respondent to show that he intended to put an end to his desertion and lastly whether in any event the appellant is entitled to call evidence to show that the respondent intended during his detention to continue his desertion.

It is not disputed for the purposes of this appeal that the respondent deserted the appellant without lawful cause from July 8, 1946, up to the time when he was detained in a mental institution on July 28, 1948, and that on his release from the institution he continued his desertion up to the date of the presentation of the petition of divorce on July 20, 1949. In these circumstances Ormerod, J., and the Court of Appeal have held that the petition cannot be granted because the intention to desert must continue throughout the period, that whilst the respondent was detained he must be assumed to have been incapable of forming any intention and that during the period

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of detention there was lawful cause for his absence from his marital home.

I agree with your Lordships that the appeal must be allowed, but I take a different view from your Lordships as to the onus of proof. In my opinion, if the original desertion is proved, the onus shifts to the deserting spouse to prove that he or she has had the intention to resume cohabitation and to show good cause why he or she has not in fact resumed it. I cannot think it is reasonable to cast the burden upon the deserted spouse of proving the intention of the deserter which ex hypothesi has not been carried out. It is for the respondent to show that he altered his intention (see *Pratt* v. *Pratt* (38)) and there is no evidence as yet to suggest that he did. In my opinion, therefore, this case should be sent back to the Divorce Court to try whether the respondent can prove that he formed the intention at any time during his detention to return to his wife and that if he does not satisfy the court of that fact the appellant should be granted a divorce.

The assumption which has been made in the cases cited and in the courts below, that persons detained in mental institutions are mindless, is, in my belief, unfounded in fact and there is nothing in the Lunacy Acts to which your Lordships' attention has been drawn which suggests that every person admitted to a mental institution is incapable of forming an intention to resume consortium with his or her spouse or any other intention.

LORD MACDERMOTT. My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Reid, in which I concur.

LORD REID. My Lords, in this case I think it right to state at the outset that I have tried to put out of my mind entirely the Scots law of divorce for desertion. I do not say that there are not some fields within the law of divorce where, if used with caution, Scots authorities may be of assistance in considering English cases and vice versa. But the whole history and background of the laws of the two countries regarding desertion are so different that in my judgment it can be of no assistance to the proper decision of a case in this field in the one country to import principles or authorities from the other.

I do not think that it has ever been denied that desertion in English law requires as an essential ingredient an animus deserendi, at least to this extent, that without it desertion cannot commence. The argument for the appellant was that after desertion has commenced it can continue without there being any such animus in the deserting spouse: that there is in this respect an essential difference between the act of desertion which starts the desertion and the subsequent state of desertion which continues it.

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(38) [1939] A. C. 417, 427–8.

My Lords, I am unable to find any support for this distinction in the statute. The statute requires that the respondent shall have "deserted the petitioner without cause for a period of at "least three years . . .". It does not say that the respondent must have deserted the petitioner and then remained in desertion or remained absent from the petitioner for three years. Whatever "desert" may mean, the statute, taken by itself, appears to me to indicate clearly that all the necessary ingredients of desertion must continue to exist throughout the period, and I can find nothing to suggest that the words of the statute ought to be given any other meaning, even if they were capable of having any other meaning. I can see very good reason for holding that once desertion has begun it will be presumed to continue in the absence of evidence to the contrary, but that is a very different thing from saying that desertion changes its legal character after it has begun.

It may well be that once an initial animus deserendi has been proved there must be evidence from which it ought to be inferred that that animus has ceased before it can be held that the desertion has come to an end; I need not consider what would be sufficient evidence for this purpose, but I have no doubt that if there is such evidence that is an end to the desertion. It was argued that this might lead to such unreasonable results that it could not be right. It was said that if it is necessary to have a continuous animus deserendi, then any illness or accident which made the deserting spouse unconscious or incapable of thought even for a day would terminate his desertion because during that day he could not have the necessary animus. I think that this argument disregards the way in which sane people do in fact maintain a continuing intention. To maintain such an intention it is not necessary to think about it every hour or even every day, and I think it would be contrary to the ordinary good sense of mankind to hold that a person who had an intention before and has the same intention after a short period of unconsciousness must be regarded as not having maintained that intention throughout. But I think that an intention must come to an end when the person no longer has a mind capable of entertaining it. I am therefore of opinion that the first argument for the appellant fails.

But another and quite different argument was also submitted. The appellant argues that she is entitled to prove that, although the respondent was detained under a reception order for nearly three months during 1948, in fact during that period his mental capacity was such that he was capable of maintaining his animus deserendi and that he did maintain it.

It was held in *Williams* v. *Williams* (39) that a respondent detained under a reception order was incapable of having an animus deserendi. The petitioner in that case does not appear to have offered to prove that in spite of the reception order the respondent had in fact sufficient mental capacity. But the ground of judgment appears to have been quite general; it was that a person detained under a reception order is never capable of having the necessary animus. I do not see why that should necessarily be so. There are many degrees of mental incapacity and there appears to be no definition of that degree of mental incapacity which is necessary to justify a reception order. In the absence of any such definition it is not obvious to me that there cannot be a case where a reception order is justified but where nevertheless the person detained still has a mind capable of maintaining an animus deserendi; and therefore I am of opinion that this petitioner ought to be allowed to prove, if she can, that this is such a case. I think that it can be taken to be common knowledge that persons so detained do not generally have such a mind; so if it appears that the respondent has been detained under a reception order, that does raise a presumption against the petitioner. But I can see no ground for holding that it is more than a presumption. I therefore think that in so far as the decision in *Williams* v. *Williams* (39) goes farther than that it goes too far. I agree that this appeal should be allowed.

Appeal allowed.
Case remitted.

Solicitors: *Jaques & Co.; Kenneth Brown, Baker, Baker.*

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(39) [1939] P. 365.

Applied. CHRISTMAS *v.* GENERAL CLEANING CONTRACTORS LD. AND CALEDONIAN CLUB TRUST LD. [1952] 1 K.B. 141

[HOUSE OF LORDS.]

H. L. (E.)*

1951
Feb. 20, 21, 22, 26;
May 9.

LONDON GRAVING DOCK CO. LD. . . APPELLANT;

AND

HORTON . . . . RESPONDENT.

Negligence—Personal injuries—Invitor and invitee—Duty of invitor—Damage from "unusual danger"—Meaning—Ship repairer occupying ship—Responsibility for adequate staging—Liability to injured employee of co-contractor.

An experienced welder who had for a month been carrying out work on a ship as an employee of sub-contractors engaged by ship-repairers in occupation of the ship, sustained injuries, without negligence on his part, owing to the inadequacy of certain staging, constituting an unusual danger, of which he had full knowledge and which, despite complaints, the ship-repairers had not remedied.

Held (*per* Lord Porter, Lord Normand and Lord Oaksey; Lord MacDermott and Lord Reid dissenting) that, the welder being an invitee, his knowledge of the unusual risk exonerated the ship-repairers from liability for the damage sustained by him and that it was not essential to their defence to establish that he was volens in that he was not under any feeling of constraint in accepting the risk.

Per their Lordships unanimously: An unusual risk is one which is not usually found in carrying out the task which the invitee has in hand.

Indermaur v. *Dames* (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311, and *Donoghue* v. *Stevenson* [1932] A. C. 562 considered.

Decision of the Court of Appeal (sub nom. *Horton* v. *London Graving Dock Co. Ld.*) [1950] 1 K. B. 421 reversed.

APPEAL from the Court of Appeal (Tucker, Singleton and Jenkins, L.JJ.).

The facts, stated by Lord Porter, were as follows:—The plaintiff (the respondent) was employed as a boilermaker and electric welder by the Thames Welding Co. Ld. By December 16, 1946, he had been employed for at least a month in the fish hold of a trawler known as the *Valmont*, of which the defendants (the appellants) were at all material times the occupiers, being employed as shipwrights in reconverting her after war service.

The plaintiff's employers had contracted with the defendants to weld metal strips into position on the sides of the hold and it was the defendants' duty to provide, and they did in fact provide, the necessary staging for the plaintiff and other workmen to work upon. They retained control of it throughout, having laid it, acting by their shipwrights, and being alone entitled to re-lay or alter it. It consisted of four boards about 20 ft. long, 11 in. wide and 3 in. thick laid fore and aft in the hold and resting upon two thwartship angle irons 5 ft. 5 in. from the bottom of the hold and about 3½ in. by 3 in. in dimension. The boards were placed about 5 ft. apart and each outside board was about 18 in. from the side of the ship. The plaintiff or any other welder who wanted to cross from one board to another could only do so by stepping on to one of the angle irons.

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* *Present:* LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD MACDERMOTT and LORD REID.

The plaintiff and some of his fellow welders had made certain complaints to the defendants' charge-hand shipwright about the insufficiency of the staging before December 16, 1946, but though some promises were made that he would see what could be done, no steps were taken to effect a change and they had not insisted. On that date the plaintiff in the course of his duty was standing on the starboard centre deal and was engaged in handing a tool box to another man on the starboard deal. For this purpose he placed one foot onto the angle iron and transmitted it safely but in trying to get back his foot slipped with the result that he fell astride the angle iron and sustained injury.

The plaintiff brought an action for damages against the defendants, alleging negligence and breach of duty on their part. In their defence they denied this, alleging contributory negligence on his part. Lynskey, J., gave judgment for the defendants, holding that they had been guilty of no breach of duty. He made no finding as to contributory negligence. The Court of Appeal reversed his decision, holding (a) that the defendants had failed in their duty to take reasonable care to make the premises safe and had failed to prove that the plaintiff had voluntarily accepted the risk, and (b) that they owed a duty to the employees of their sub-contractors equally with their own workmen to provide proper equipment, but had failed to do so. The defendants appealed to the House of Lords.

Nelson, K.C., and *R. M. H. Everett* for the appellants (defendants). The duty imposed in this present case is derived from the application of a series of recognized principles. One must see first whether the particular relationship creates a duty. If so, what is that duty and has it been broken?

There is here no breach of the duty laid down in *Donoghue* v. *Stevenson* (1), for the plaintiff here had the fullest knowledge of the exact state of the premises, and the facts are very far from the issue by a food manufacturer of something not safe to eat. This case is also different from that of *Oliver* v. *Saddler & Co.* (2), where there was no reasonable opportunity for the dock porter to examine the defective sling.

Willes, J., in *Indermaur* v. *Dames* (3), affirmed in the Exchequer Chamber, fully and correctly states the law as to the duty an invitor owes to an invitee, which is not so strict as that contended for by the respondent. It is expressed to be to take "reasonable care to prevent damage from unusual danger of "which [the invitor] knows or ought to know". The invitor is not in breach of that duty if he has taken reasonable care to make the premises safe or if the invitee has knowledge or notice of any danger. Of the two theories current since *Indermaur* v. *Dames* (4), (a) that an invitor owes no duty to an invitee with knowledge or due notice of the relevant danger, and (b) that the invitor's duty is to take reasonable care to protect his invitee from the relevant danger, the former is correct: see Salmond on Torts (10th ed.), pp. 475 and 479, and Halsbury's Laws of England (2nd ed.), Vol. XXIII, p. 604, para. 853. The principle of *Indermaur* v. *Dames* (4) is applicable whether or not the knowledge of the invitee can avert the danger.

A duty is owed to a person in a particular category irrespective of the purpose for which he comes onto the premises. The decision of the Court of Appeal in the present case has caused confusion of the principles applicable to the different categories, so that it has been argued that one need not draw any distinction between the duty owed by an employer to his own workmen and the duty which he owes to a sub-contractor's employees, who are invitees on the premises: see, for example, *Pratt* v. *Richards* (5). See also *Denny* v. *Supplies & Transport Co. Ld.* (6), which sought unjustifiably to extend *Donoghue* v. *Stevenson* (7).

As to the meaning of "unusual danger" in *Indermaur* v. *Dames* (8), this means a danger unusual from the point of view of the particular invitee, one which is unexpected and therefore unknown to him. An unusual danger may become usual for a particular invitee by his becoming used to it, and then as regards that invitee the invitor ceases to have any duty. His obligation is ended if he gives due notice or if the invitee is aware of the danger.

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(1) [1932] A. C. 562.

(2) [1929] A. C. 584.

(3) (1866) L. R. 1 C. P. 274, 288; (1867) L. R. 2 C. P. 311.

(4) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(5) [1951] 2 K. B. 208.

(6) [1950] 2 K. B. 374.

(7) [1932] A. C. 562.

(8) L. R. 1 C. P. 274, 288.

The principle volenti non fit injuria is not relied on and it is not necessary to show that the invitee was volens as well as sciens. *Cavalier* v. *Pope* (9) supports the view that an invitee who is sciens is in the same position as one who is volens: see also *Brackley* v. *Midland Railway* (10). Notice can put part of premises outside the scope of any duty owed by an invitor. For example, a person who comes by invitation on board a ship while she is loading is aware that he is exposing himself to all sorts of dangers and cannot complain if he is injured by one of them. Once the invitee knows of the danger the invitor is exonerated from further liability to him, and the invitee may either continue to accept the invitation at his own risk or go away; that is the choice before him, whether he consciously makes it or not, and if he go on he may not deny that he accepted the risk: see *The Moorcock* (11).

The question whether a person was volens only arises if there is a duty, but in this case there was no duty on the defendants because the danger was obvious and was appreciated by the plaintiff.

The class of case relating to invitor and invitee has nothing to do with cases relating to the provision of plant such as *Heaven* v. *Pender* (12).

See also *Norman* v. *Great Western Railway Co.* (13); *Fairman* v. *Perpetual Investment Building Society* (14); *Jacobs* v. *London County Council* (15); *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (16); *Griffiths* v. *Smith* (17); *Le Lievre* v. *Gould* (18); and *Dunster* v. *Hollis* (19). It is not necessary to refer to *Farr* v. *Butters Brothers & Co.* (20); *Buckle* v. *Holmes* (21); *Haseldine* v. *C. A. Daw & Son Ld.* (22); and *Hiller* v. *I.C.I. (Alkali) Ld.* (23).

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(9) [1906] A. C. 428, 432–3.
(10) (1916) 85 L. J. (K. B.) 1596, 1605–6.
(11) (1889) 14 P. D. 64, 69.
(12) (1883) 11 Q. B. D. 503.
(13) [1915] 1 K. B. 584.
(14) [1923] A. C. 74.
(15) [1950] A. C. 361, 368–9.
(16) [1929] A. C. 358.
(17) [1941] A. C. 170, 182.
(18) [1893] 1 Q. B. 491.
(19) [1918] 2 K. B. 795.
(20) [1932] 2 K. B. 606.
(21) [1926] 2 K. B. 125.
(22) [1941] 2 K. B. 343.
(23) [1934] 1 K. B. 455; [1936] A. C. 65.

R. M. H. Everett following. The difference between an employer's duty and an invitor's duty lies in the fact that the former is based on the contract of service with his workmen: see *Smith* v. *Charles Baker & Sons* (24); *Wilsons & Clyde Coal Co. Ld.* v. *English* (25); and *Naismith* v. *London Film Productions Ld.* (26), *per* Goddard, L.J.

As to absence of opportunity for examination and also the qualification of the rule in *Donoghue* v. *Stevenson* (27), see *Herschtal* v. *Stewart & Ardern Ld.* (28).

The principle of volenti non fit injuria is only relevant if there was a continuing duty. It applies, for example, if one points out the risk to the man who is subsequently injured and he agrees that the risk shall be his. Thus if a man comes to clean the guttering of one's house and one points out to him that the only ladder available has a rung missing and he takes the risk, from then onwards there is no further duty to him in respect of it. The notice which is sufficient to discharge the liability depends on the facts of the case. A written notice, for example, is no warning to an illiterate, but if one does not know of his defect it is sufficient to give what a reasonable and prudent man would regard as sufficient notice. On the other hand, if the danger is obvious volenti non fit injuria does not arise at all. As between employer and employee the principle is virtually a dead letter.

Edgedale, K.C., Doughty and *John Tatham* for the respondent (plaintiff). On the pleadings it is not open to the defendants to say that the plaintiff has undertaken the risk. There is no question but that in a case of this kind the defendants owed a duty of care to the plaintiff. The defendants were neighbours of the plaintiff in the sense used by Lord Atkin in *Donoghue* v. *Stevenson* (29). As such they owed him a duty to take reasonable care to avoid acts or omissions likely to injure him and in particular to see that the staging was safe. There was a breach of that duty because the staging was defective.

Further, the defendants as invitors did not exercise the degree of care owed by them to the plaintiff, their invitee, in such a case as this. *Indermaur* v. *Dames* (30) also exemplifies the concept of neighbourly duty expressed in *Donoghue* v. *Stevenson* (29). The words of Willes, J., in the earlier case, relied on by the defendants, are not to be treated as if they were part of an Act

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(24) [1891] A. C. 325, 362.
(25) [1938] A. C. 57, 78.
(26) [1939] 1 All E. R. 794, 797.
(27) [1932] A. C. 562.
(28) [1940] 1 K. B. 155, 162–3.
(29) [1932] A. C. 562.
(30) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

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of Parliament. The questions which arise are: On the particular facts did the defendants owe a duty of care to the plaintiff? If so, were they negligent in the circumstances? Did their negligence cause injury to the plaintiff? All three questions must be answered in the affirmative. Whatever may be the general principle, the one person who is under a duty of care must be the person who supplies the scaffolding, as in *Heaven* v. *Pender* (31). The defendants were taking on themselves the duty of care which the employer normally owes to his workmen, since at common law a master is under an obligation to provide them with proper material. In the present case he has instead handed the duty on to the defendants. To leave scaffolding like this is an unusual danger for a welder, although it might not be for a steeplejack, but it is from the point of view of a welder that the question of unusual danger must be considered. It is a question of degree in such case.

An invitor's duty to take care does not disappear if the invitee knows of the danger. He must establish not only knowledge on the part of the invitee but also either contributory negligence on his part or else a free and voluntary acceptance of the risk. The principle volenti non fit injuria is relevant as between invitor and invitee: see *Letang* v. *Ottawa Electric Railway Co.* (32), which on this point is conclusive in the plaintiff's favour. It is not proved that he voluntarily undertook the risk, and knowledge alone is not a complete defence. See also *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (33) and *Weigall* v. *Westminster Hospital* (34).

The case most strongly against the plaintiff is *Brackley* v. *Midland Railway* (35), but the facts of that case are quite different from those of the present case, and the observations relied on by the defendants are obiter dicta: see *per* Bankes, L.J. In that case there was a misunderstanding of *Cavalier* v. *Pope* (36). See also Salmond on Torts (10th ed.), p. 474, n. (*x*); *Bowater* v. *Rowley Regis Corporation* (37); *Norman* v. *Great Western Railway Co.* (38); *Osborne* v. *London & North Western Railway Co.* (39); and *Chapman* v. *Rothwell* (40).

Doughty following. Where workmen have known of a special danger, have complained to their masters and have subsequently been injured, they have yet been held entitled to recover. The position of an invitee is no different. It is not a sufficient defence for the invitor to show that he gave notice of the danger. He must also show that the injured invitee was either negligent or volens. If a defective roof renders the sole approach to a railway station ticket office dangerous and the railway give notice of the defect, a passenger who took the risk and was injured could not be held to be either volens or negligent. The fact that a defect is obvious is no defence unless the invitee has a reasonable chance of avoiding the danger. As to the question of " unusual danger ", a steeplejack, although he does a dangerous job, would have a cause of action if he were injured by the blowing away of a scaffolding known to his employers to be flimsy or by being hit by a stone known to be loose. [He referred to *Thrussell* v. *Handyside* (41) and *Mowbray* v. *Merryweather* (42), *per* Kay, L.J.]

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(31) (1883) 11 Q. B. D. 503.
(32) [1926] A. C. 725.
(33) [1929] A. C. 358.
(34) (1935) 51 T. L. R. 554; (1936) 52 T. L. R. 301.
(35) 85 L. J. (K. B.) 1596.
(36) [1906] A. C. 428, 431–2.
(37) [1944] K. B. 476.
(38) [1914] 2 K. B. 153.
(39) (1888) 21 Q. B. D. 220.
(40) (1858) El. Bl. & El. 168.

Nelson, K.C., in reply. The common law starts with the relationship between the parties. It is the relationship that creates the duty. In the case of the duty of an invitor, he may discharge it either by taking steps to make the premises safe or by giving the invitee adequate warning. This is the established rule, although its application may produce anomalies in certain cases. Here the plaintiff, being fully aware of the danger, is in the same position as if he had been given notice. Therefore there is no breach of any duty owed him by the defendants, and there is no room for any consideration of the doctrine of volenti non fit injuria. As to the unusual danger of which the invitee must receive adequate warning, not everyone may have the same knowledge of the premises. One man may be fully aware of what to expect, and so may need no warning, while another may need to be told, e.g., in the case of swinging slings on a ship which is being loaded. This is a narrow but very important point on the meaning of *Indermaur* v. *Dames* (43). *Brackley* v. *Midland Railway* (44) is directly in point. See also *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (45).

Their Lordships took time for consideration.

(41) (1888) 20 Q. B. D. 359.
(42) [1895] 2 Q. B. 640, 644.
(43) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(44) 85 L. J. (K. B.) 1596.
(45) [1929] A. C. 358, 370.

May 9. Lord Porter. My Lords, the respondent maintained that the Court of Appeal were right in holding the appellants to be in fault and that he was entitled to recover the damages which, if recoverable, had been agreed at 275*l*. The claim was put in two ways. First, it was said that he was an invitee and the appellants had not exercised the degree of care required in such a case. Secondly, it was said that upon the principle laid down in *Donoghue* v. *Stevenson* (46) the appellants owed a duty to the respondent to take reasonable care to avoid acts or omissions likely to injure him.

Under the first heading the duty towards an invitee was said to be to take reasonable care that the premises were safe or, alternatively, if the duty was not so high, at any rate to establish that the danger was appreciated by the invitee, and was freely undertaken by him with full knowledge of the risk he was running and unconstrained by any feeling which would interfere with the freedom of his will. In other words, it must be shown that he was volens within the meaning applied to that word in the phrase volenti non fit injuria as interpreted by Scott, L.J., in *Bowater* v. *Rowley Regis Corporation* (47).

The appellants on their part contended that the duty of an invitor was of a lesser order than either of those claimed by the respondent. In their submission they had fulfilled their duty if either they took reasonable care to make the premises safe or if the invitee had knowledge or notice of the danger.

My Lords, I have put the contentions on either side in a broad way because it is apparent that in one aspect the case demands a solution of the much discussed problem of the distance to which the burden imposed by the decision in *Indermaur* v. *Dames* (48) is to be carried and in what manner Willes, J.'s dictum (49) is to be interpreted. If the respondent is right in saying that notice or knowledge is immaterial, that the invitor is under an obligation to use reasonable care to make the premises safe, however manifest the risk may be, then unless the appellants can show that the respondent was volens they cannot escape liability. To this distance at least I understand Singleton, L.J., to have carried the doctrine in this case.

The dispute has raged now for many years round Willes, J.'s language "that he, using reasonable care on his part for his own "safety, is entitled to expect that the occupier shall on his part

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(46) [1932] A. C. 562.

(47) [1944] K. B. 476.

(48) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(49) L. R. 1 C. P. 274, 288.

"use reasonable care to prevent damage from unusual danger, "which he knows or ought to know". As was pointed out in argument and with truth, Willes, J.'s words are not embedded in a statute, but they have been carefully chosen, often acted upon and form the basis upon which the duty of an invitor is established.

I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is not to prevent unusual danger but to prevent damage from unusual danger. It is in this consideration, as I think, that notice or knowledge becomes important: either may prevent damage though the unusual danger admittedly exists. As I take this view, I find the question what is unusual danger of less importance than it might otherwise be considered. To my mind danger may be unusual though fully recognized and I am not prepared to accept the view that the word "unusual" is to be construed subjectively as meaning unexpected by the particular invitee concerned.

Moreover, I get little assistance from the alternative word "unexpected" suggested by Lord Phillimore (then Phillimore, L.J.) in *Norman* v. *Great Western Railway Co.* (50): I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think Phillimore, L.J., in *Norman* v. *Great Western Railway Co.* (50) is speaking of individuals as individuals but of individuals as members of a type, e.g., that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack though it would be for a motor mechanic. But I do not think a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness.

In the present case undoubtedly there was a danger of slipping owing to the wide spacing of the planks, and that danger is, in my opinion, accurately described as unusual. But the existence of that factor is not in itself enough to ensure the success of the respondent. Indeed, his advisers do not so contend. Contributory negligence on his part would destroy his claim and so, as I understand their concession, would a free and willing and unconstrained acceptance of the risk with full knowledge of its danger. It is in a consideration of this last concession, as I think, that the real contest lies. Contributory negligence may be disregarded. No act of the respondent could be so described.

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(50) [1915] 1 K. B. 584, 596.

The plea volenti non fit injuria does not appear in the defence, nor, as I explain hereafter, was it, in my opinion, necessary for the appellants to prove such facts as would warrant a finding to that effect, but in any case even if it was incumbent on the appellants to establish that the respondent undertook the risk willingly and without constraint, I do not think a formal pleading to that effect was necessary. The protagonists are invitor and invitee and the former is entitled to set up by way of defence any circumstance which would enable him to escape liability at the suit of the latter. If notice or knowledge of the danger on the part of the invitee is enough, then he can prove and rely on the existence of either or both. If in order to succeed in that defence the appellants must prove such facts as would establish a plea of volenti non fit injuria, then the appellants can cross-examine or call evidence to that effect, and if this testimony is accepted will escape liability, not because they have pleaded that the respondent was volens but because they have established the fact that they have performed the obligations incumbent upon invitors.

Singleton, L.J., as I think, recognizes this contention to be accurate but holds that the respondent has not been shown to be volens, and Tucker, L.J., finds that the evidence proves the respondent to have been sciens, but not volens. Jenkins, L.J., if I understand him rightly, goes further and takes the view that the appellants were under a duty to provide safe staging and if they did not do so were liable in negligence.

I find it difficult to take any of these views. I accept the contention that an invitor's duty to an invitee is to provide reasonably safe premises or else show that the invitee accepted the risk with full knowledge of the dangers involved. If the parties were master and servant it may well be that one should go further and say that a full appreciation of the risk is not enough, the servant must not be put in a position in which he is obliged either to obey orders or to run the risk of dismissal. But to my mind the position is different where the injured person is not a servant but an invitee. Admittedly the duty of a master to his servant is higher than that of an invitor to his invitee: the invitor, as I see it, is not concerned with the position of the invitee vis-à-vis his own ultroneous master: so far as he is concerned the invitee is an invitee and nothing more. I am content to accept Singleton, L.J.'s statement (51) that the rule of law as stated by Willes, J., in *Indermaur* v. *Dames* (52) ends with the words "damage from unusual danger, which he knows or ought "to know". But the duty is not "to prevent damage" but to "use reasonable care" to prevent it and it has to be determined what is reasonable care. This problem is dealt with in the latter part of Willes, J.'s statement, by which I understand him to mean: Even if there is unusual danger, the duty to use reasonable care to prevent damage may be performed by notice, lighting or guarding, and the recognition that the invitor may fulfil the obligations imposed upon him by notice or lighting indicates that adequate warning to the invitee may be a compliance with the duty which is owed by the invitor.

It is not, to my mind, an answer to say that the risk was there and the invitee returned to his work daily as the invitor knew. He did come back and continue his work but, as the learned judge has found, he did so with full knowledge of the risk he ran. The real question is whether that fact is enough to exonerate the appellants or whether in the case of an invitee as in that of an employee it is incumbent to show not only that the invitee knew and appreciated the danger, but also willingly undertook it. If so, the position of an invitee is on exactly the same footing as that of an employee except for such special rights to compensation given to a workman under Acts dealing with the relation of master and servant. In my opinion, however, it is not the same but is to be judged by a less exacting standard.

On the principle which I have asked your Lordships to accept, the question therefore is: Did the invitee undertake the risk of performing his task with full appreciation of the danger? This, as has been said more than once, is a question of fact for a jury to decide, if there be a jury; if not, it must be decided, like all other questions of fact, by the tribunal which tries the case—in the present instance by Lynskey, J. At the end of his judgment that learned judge says (53): "If it were necessary to decide it, "I should have held on the facts of this case that the plaintiff "did freely and voluntarily impliedly agree to accept the risk of "working on the staging with full knowledge of the nature and "the extent of the risk he ran".

(51) [1950] 1 K. B. 421, 427.
(52) L. R. 1 C. P. 274, 288.
(53) [1949] 2 K. B. 584, 590.

He had, in my opinion, evidence on which he could reach the conclusion that Horton had at least full knowledge of the nature and extent of the risk which he ran and I do not feel justified in reversing this decision. Such a finding is, I think, a sufficient answer to a contention by an invitee that the invitor fell short of the standard of care which the law imposes upon him. It is true that the staging was and remained unsafe, notwithstanding that complaints were made and it is true also that the appellants did nothing to improve it, but the invitee has been held to have had full knowledge of his risk and such notice or knowledge is sufficient to exculpate the invitor provided the full significance of the risk is recognized by the invitee.

I cannot myself find much assistance in the decided cases. The exact meaning of Willes, J.'s words in *Indermaur* v. *Dames* (54) and their true legal consequences have long been in dispute and for many years formed a basis of discussion by the text-book writers.

The difference between sciens and volens has by now been firmly established, but where the exact line is to be drawn is a matter of more difficulty. The accurate demarcation, however, in my opinion, need not be laid down in the present case, since it is enough to protect the invitor from liability if he proves that the invitee knew and fully appreciated the risk. The further step, that he must be shown not to have been under a feeling of constraint or, to put it otherwise, must have been volens, is not an essential to the defence. Whether the learned judge meant to find that the respondent was volens I am not sure, nor am I sure that if he had meant to do so he had evidence which entitled him to reach that conclusion. But, as I have said, my view is that the question does not arise.

Before one considers the cases in which *Indermaur* v. *Dames* (54) was followed or discussed it may be well to bear in mind that not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement. It must be read in its context and the most that can be expected is that it should be accurate enough for the matter in hand.

Two illustrations may suffice and two expressions be contrasted. Lord Hailsham's words in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (55), "Towards such persons" (i.e., invitees) "the occupier has the duty of taking reasonable "care that the premises are safe"; and the dictum of Lord

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(54) L. R. 1 C. P. 274.

(55) [1929] A. C. 358, 365.

Atkinson in *Cavalier* v. *Pope* (56): " . . . one of the essential "facts necessary to bring a case within that principle" (i.e., the duty of invitor to invitee) "is that the injured person must not "have had knowledge or notice of the existence of the danger "through which he has suffered". The first was the case of a trespasser and Lord Hailsham was doing no more than setting out a rough differentiation between the duties owed to an employee, an invitee, a licensee and a trespasser. No accuracy or exactness of expression was required. In the latter, the duty of a landlord who had let a dilapidated house was under discussion. Except to point out that no question of invitor or invitee came in question, that relationship was immaterial to the point at issue.

Even cases such as *Brackley* v. *Midland Railway* (57), where the statement of principle was obiter since the danger was on a highway and not on private property; *Griffiths* v. *Smith* (58), where again the view expressed was obiter; and *Wilsons & Clyde Coal Co. Ld.* v. *English* (59), which raised a question as to a safe system of working, must be regarded with caution. And so must cases dependent upon contract, such as *Osborne* v. *London & North Western Railway Co.* (60), or those dealing with the relationship of master and servant, such as *Bowater* v. *Rowley Regis Corporation* (61). None seems to me conclusive of the matter under discussion, and though natural sympathy must make the inclination lean towards a desire to compensate the respondent for his injury, the true principle is, in my opinion, that a full appreciation of the danger on the part of the invitee and a continuance of his work with that knowledge is sufficient to free the invitor from liability for damage occasioned by the insecurity of the premises to which resort is made.

The argument based on *Donoghue* v. *Stevenson* (62) can be more rapidly disposed of. The appellant in that case had purchased from a middleman a bottle of ginger beer, into which a snail had crept, and was made ill by drinking the contents. She did not, however, sue the vendor, but proceeded against the original manufacturer, alleging that he ought to have contemplated that the ginger beer would in the ordinary course reach the lips of the pursuer without any intermediate examination, and was negligent in not ensuring that the bottle had been kept clean before the ginger beer was inserted. Your Lordships' House held that, assuming the facts alleged to be true, the manufacturer would have escaped if it was natural to expect that the intermediate vendor would take care to see that the contents were in order. The pursuer, however, could recover from the manufacturer because such an examination was not to be expected. The law required the latter to be careful not to run the risk of injuring a person whom he contemplates or ought to contemplate as likely to be injured by his negligence, but an examination by the retail vendor, if rightly expected, could be relied upon by the manufacturer and would have been a complete answer to the claim. Still more so would knowledge by the purchaser of the true position, whether such knowledge was actual or such as the circumstances would warrant the manufacturer to assume. The defence did not have to show that the pursuer drank the contents with a full knowledge of the risk: it would have been enough if examination and consequent knowledge was to be expected. To that extent an argument based on *Donoghue* v. *Stevenson* (63) seems less forcible than the more obvious contention founded upon the relationship of invitor and invitee. Neither ground, in my opinion, supports the conclusion that the appellants were in breach of their duty of care.

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(56) [1906] A. C. 428, 432.
(57) 85 L. J. (K. B.) 1596.
(58) [1941] A. C. 170.
(59) [1938] A. C. 57.
(60) (1888) 21 Q. B. D. 220.
(61) [1944] K. B. 476.
(62) [1932] A. C. 562.

I should allow the appeal with costs in your Lordships' House and below.

Lord Normand. My Lords, I agree with my noble and learned friend on the woolsack that the appeal succeeds. It is unnecessary for me to repeat the facts which he has stated.

The appeal was argued mainly on the duty owed in the particular circumstances of the case by an invitor to an invitee, and in my opinion the case properly falls within that category. For though the usual, and perhaps the original, example of an invitee is a person who comes upon land or enters premises such as a shop or dwelling-house in pursuance of some business common to him and the occupier, there is no doubt that the respondent's counsel was right in saying that ships at a wharf or in dock have frequently been treated as "premises" and that there can be no real difference between the rights of persons entering a ship for the purpose of repairing it and of persons entering a shop as customers.

In the well known and frequently cited passage in *Indermaur*

(63) [1932] A. C. 562.

v. *Dames* (64), Willes, J., stated the principle of the invitor's liability in tort. The invitee, "using reasonable care on his part "for his own safety, is entitled to expect that the occupier shall "on his part use reasonable care to prevent damage from unusual "danger, which he knows or ought to know; and that, where "there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or "otherwise, and whether there was contributory negligence in "the sufferer, must be determined by a jury as matter of fact".

There are murmurs increasing with the passage of time against a clean cut division between invitees and licensees with a hard and fast delimitation of the duties owed to each category, but the exposition by Willes, J., of the duty owed to invitees has been adopted in many subsequent cases and it has even been treated almost as if it were a section in a statute and as if all questions could be solved by construing and applying it. And it is remarkable that in spite of the great variety of circumstances to which it has been applied criticism seems to have been confined to pointing out an ambiguity or uncertainty in application, the inevitable accompaniment of any condensed statement of a complex legal conception. Nevertheless, later decisions and judicial dicta have in some respects clarified the duties of the invitor, as I hope to show.

One problem, however, remains very much where Willes, J., left it. The occupier has no duty to the invitee unless there is an unusual danger which he knew or ought to have known. But what is an unusual danger? It may not be unreasonable to suppose that Willes, J., was aware that "unusual" is a word which might take a colour from the circumstances of the case, and that a definition of unusualness might hinder instead of helping a just solution of a specific problem and the rational development of the law.

We were referred to the observation of Phillimore, L.J., in *Norman* v. *Great Western Railway Co.* (65). In that case a railway station yard was bounded by an unfenced bank. The plaintiff was in the habit of going himself, or sending a driver, with a horse and van to receive or deliver goods. On the occasion in question the driver left the horse unattended while he was in the defendants' office signing for goods. The horse in his absence backed the van over the bank and damage resulted. It was held that the railway company's duty to the plaintiff was no

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(64) L. R. 1 C. P. 274, 288.

(65) [1915] 1 K. B. 584.

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higher than that of an occupier to an invitee and that there was no evidence of any breach of the duty to take reasonable care that the premises were safe for persons using them in the ordinary manner and with reasonable care. Phillimore, L.J., said (66): "I am not certain that a way to avoid misapprehension which "might arise from the use of the words 'unusual danger'— "which means, in my opinion, danger unusual for the particular "person—might not be found by substituting the word 'unexpected' for 'unusual'. It is not a question whether the "danger is unusual with regard to all the world, but whether it "is unusual with regard to the individual complainant. In other "words, in analysing the expression 'reasonably safe' one must "take into account what is called in modern parlance the personal equation; what may not be safe for one person may be "safe enough for the persons who frequent particular business "premises. For instance, in loading a ship in a dock a gangway "consisting of a plank without a handrail may safely be provided, though its narrowness or slope may be such that ordinary "persons, not accustomed to ships, might not find it easy to use, "because the stevedore and seamen who are to use it can use it "safely. The gangway has to be safe for the class of persons "who use it on business, and so far as any complaint is concerned it has to be reasonably safe for him. If it is safe for "him, it does not matter whether or not it is safe for anybody "else. It is for that reason that the element of knowledge comes "in".

Pickford, L.J., expressed his agreement with these observations. I humbly confess that I find them more ambiguous and uncertain than the words they seek to explain. I do not find that the substitution of "unexpected" for "unusual" helps me much. But the real difficulty is that the Lord Justice speaks with two voices, sometimes saying that the premises have to be safe for the class of persons who come onto them on business, and sometimes that the danger is unusual if it is unusual for the particular individual. I think that there is a confusion between the condition which gives rise to the duty, the existence of an unusual danger, and the notice, or its equivalent, the knowledge of the individual invitee, which may be a discharge of the duty. I am of opinion that if the persons invited to the premises are a particular class of tradesman then the test is whether it is unusual danger for that class. So if the occupier supplies the

(66) [1915] 1 K. B. 584, 596.

sort of gangway which stevedores usually use he has performed his duty so far as stevedores are concerned, and if a particular stevedore suffers from a defective sense of balance and falls off the gangway he cannot complain of the occupier's failure of duty. The sufferer knew the danger for him and he must accept the responsibility of using a gangway which might be dangerous for him because of his idiosyncrasy. But a gangway which is reasonably safe for stevedores and which is no unusual danger for them, may well be an unusual danger for another class of workman or for members of the public generally.

So much for "unusual" in relation to persons. But a danger may also be "usual" or "unusual" in relation to the place. For example, a quay is dangerous, though it is not in daylight an unusual danger for normal adults, but an uneven joint between two stones near the edge of the quay may be an unusual danger to anyone, and is none the less an unusual danger though it is not a concealed danger. I would not agree that a danger which is unusual in either of the ways I have suggested ceases to be an unusual danger because through frequent visits to the place it becomes familiar. In such a case another question will arise, whether in fact the invitee had sufficient notice, but the danger in my opinion remains an unusual danger. Though I think it is possible to discriminate in a concrete case between a danger which is unusual and one which is not unusual, no attempt to formulate a definition of unusualness appears to me to be likely to succeed.

In the present case Lynskey, J., held that an unusual danger means a danger unusual from the point of view of the particular invitee, and that if the invitee appreciates the existence upon the premises of a danger and its nature and extent it cannot be for him an unusual danger. He also held that the plaintiff had full knowledge of the nature and extent of the danger. In the Court of Appeal Singleton, L.J., held that the danger created by the staging was unusual because it was of a kind not usually encountered by welders engaged in the repair of a ship, and that it did not become a usual danger merely because the person suing knew of it before his accident. For the reasons I have given, I agree with the Court of Appeal on this point.

The question then arises whether the defendants discharged the duty which they owed to the invitee in relation to this unusual danger. It is a duty of reasonable care for the safety of the invitee. For some time it appears to have been in doubt whether the duty of care could be discharged by warning or notice of the danger. But it seems to me that the point is settled by a series of decisions, of which *Workington Harbour and Dock Board* v. *Towerfield* (*Owners*) (67) is the latest, in which it has been held that harbour authorities or wharfingers inviting ships of a certain size to enter the harbour or tie up at the wharf owe to their owners the duty of an invitor to an invitee and that this duty is discharged by giving warning of dangers of which they knew or ought to have known. The cases are numerous, and in addition to *The Towerfield* (67) I will mention only *Reg.* v. *Williams* (68) and *Anchor Line* (*Henderson Brothers*) *Ld.* v. *Dundee Harbour Trustees* (*The Circassia*) (69).

In the last-mentioned case Lord Haldane said of ships entering the harbour of Dundee: "Their legal position would thus be like "that of the plaintiff in the well-known case of *Indermaur* v. "*Dames* (70), and they would be entitled to look for the discharge "of a duty resting on the respondents to exercise reasonable care "to avert peril to them from any unusual danger of which the "respondents knew or ought to have known. . . . On the other "hand, those approaching with their vessels must, notwithstanding their right to rely on such care having been exercised, use "care on their own part not to incur peril rashly". In that case the defenders were held liable because inter alia they failed to give warning of the position of a sunken wreck in the approaches to the harbour by means of properly disposed buoys. In the harbour and wharf cases the duty of warning has arisen both in circumstances when the harbour authority or wharfinger had been guilty of negligence in allowing an obstruction to grow up on the bed of the harbour or at the wharf, or in failing to remove such an obstruction, and in cases where there had been no such prior negligence and the only breach of duty was the failure to warn. There is, however, no principle by which warning may be an appropriate discharge of the duty owed to invitees by a harbour authority but inappropriate in other cases. Judicial dicta in support of the view that warning is a discharge of the invitor's duty generally are not lacking and they are of high authority. Thus, in *Cavalier* v. *Pope* (71), Lord Atkinson said of *Indermaur* v. *Dames* (70), ". . . one of the essential facts necessary to bring "the case within that principle is that the injured person must "not have had knowledge or notice of the existence of the danger

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(67) Ante, 112.

(68) (1884) 9 App. Cas. 418.

(69) 1922 S. C. (H. L.) 79, 83; 38 T. L. R. 299, 300.

(70) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(71) [1906] A. C. 428, 432.

"through which he has suffered. If he knows the danger and "runs the risk he has no cause of action". In *Brackley* v. *Midland Railway* (72) Swinfen Eady and Bankes, L.JJ., expressed the same opinion. So also did Lord Maugham in *Griffiths* v. *Smith* (73).

When there is already knowledge, notice or warning will have no effect and the omission of it can do no harm. So the defendant who has failed to give warning may yet succeed if he proves that the injured person had knowledge of the unusual danger. But whether it be knowledge gained without a warning or knowledge conveyed by a warning, it must be sufficient to avert the peril arising from the unusual danger. The knowledge must, therefore, be full knowledge of the nature and the extent of the danger. In the present case the judge has found that the plaintiff had full knowledge of the nature and the extent of the peril, and the finding is beyond doubt warranted by the evidence, which shows that the plaintiff had before his accident complained of the same defects in the staging as were proved at the trial.

The real difficulty of the case is in the argument that though a warning may sometimes be a discharge of the invitor's duty, for example, if it excludes a part of the premises from the area of the invitation, or if it is given to a person who has nothing to consider but his own safety and pleasure, it is not sufficient if the invitee is under a duty to his employer to work in the area of the danger. In such a case, it is said, the invitor must prove not merely that the invitee knew of the danger but that, knowing it, either he was himself negligent or he freely and voluntarily agreed to accept the risk. In the present case this argument is of vital importance, for the plaintiff was under his contract of service engaged on the repair of the ship, and for that work the use of the defective staging was necessary. Contributory negligence was pleaded but not proved. The defence of volenti non fit injuria was not pleaded, and the defendants relied on the plaintiff's knowledge of the danger not towards establishing the plea volenti non fit injuria but as an equivalent to the discharge of their duty by warning. The issue between the parties may be stated in this way: the defendants say that if the plaintiff incurred the risk sciens he must fail; whereas the plaintiff says that he succeeds unless it is shown that he incurred the risk sciens et volens.

On this issue I am not aware of any direct authority. In

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(72) 85 L. J. (K. B.) 1596.

(73) [1941] A. C. 170, 182.

Letang v. *Ottawa Electric Railway Co.* (74) the invitors argued that the defence volenti non fit injuria was established and it was held that it was not. If the appellant's argument in this appeal is sound, the defendants in *Letang* (74) assumed a greater onus than was necessary for their success. It is impossible to say what the result would have been if *Letang* (74) had been argued on the lines of the appellants' argument in this case. The solution must therefore be attempted on principle unaided by authority. The strength of the plaintiff's case is that the defendants knew that the welders were coming daily to their work and using the staging as their invitees and that they were under a contract of service to do so. Yet the plaintiff's contract of service with his employer cannot be pleaded either by or against the invitor who is a stranger to it. Otherwise the invitor would owe to the invitee the same duty as an employer owes to his employees, and the invitee could sue with an equal prospect of success either his employer or an occupier of the premises who had erected staging thereon under a contract with his employer. Such a result would be just if the employer found liable in damages to his workman could in all circumstances recover the damages from the occupier. But counsel for the plaintiff recognized that the right of recovery might not be always available. The principle of avoiding circuity of actions cannot be invoked, and to say that the invitor had agreed to perform the employer's duty to his employees is to resort to a fiction, and fiction is no longer an acceptable solution for the problems of industrial relationships. The sufferer must make up his mind whether to sue as an invitee or as an employee under his contract of service. He cannot, in my opinion, sue as an invitee and at the same time found upon his contract of service as restricting his freedom to act upon a warning of unusual danger given to him by the invitor.

Singleton, L.J., and, I think, Jenkins, L.J., also held that there was liability on the principles established in *Donoghue* v. *Stevenson* (75).

My Lords, in *Donoghue* v. *Stevenson* (75) the question was whether a ginger beer manufacturer who had sold a bottle of ginger beer to a retailer was under any duty of care in manufacture to a consumer who was in no contractual relation with him. The argument for the defender was that there were certain relationships, such as physical proximity or contract, which alone give rise to duties in the law of quasi-delict or tort, and that the

(74) [1926] A. C. 725.

(75) [1932] A. C. 562.

relationship between the pursuer and the defender was not one of them. The decision was that the categories of negligence are not closed and that duties of care are owed not only to physical neighbours but to anyone who is " my neighbour " in the wider sense of " persons who are so closely and directly affected by my " act that I ought reasonably to have them in contemplation as " being so affected when I am directing my mind to the acts or " omissions which are called in question " (Lord Atkin (76)).

But this general proposition left over the question whether in the circumstances of the case the consumer was so closely and directly affected by the manufacturer's act that the manufacturer owed him a duty of care. The answer was that the manufacturer " puts up an article of food in a container which he knows will " be opened by the actual consumer. There can be no inspection " by any purchaser and no reasonable preliminary inspection by " the consumer " (Lord Atkin (77)). He was therefore liable though there was no contract between him and the consumer and though he had parted with the bottle so that there was no " physical proximity " through it between him and the consumer. The importance of the absence of any real opportunity for examination of the contents is emphasized in the speeches of Lord Thankerton (78) and Lord Macmillan (79). In the present case there is no need to seek out in *Donoghue* v. *Stevenson* (80) a reason for finding that the defendant owed a duty of care to the plaintiff. Admittedly he owed that duty which an invitor owes to his invitee in respect of premises in the possession and control of the invitor. And in any event there was in the present case an opportunity for inspection, both by the plaintiff's employers and by the plaintiff himself, so that the plaintiff actually knew as the result of his inspection the very defects of which he now complains. *Donoghue* v. *Stevenson* (80) cannot, in my opinion, have any application to this case.

For these reasons I would allow the appeal.

LORD OAKSEY. My Lords, I agree with the opinions of the noble Lord on the woolsack and of my noble friend Lord Normand.

The respondent, though a workman, was not employed by the appellants and it is common ground that their relation was that of invitor and invitee and not master and servant. The duty of an

(76) [1932] A. C. 562, 580.
(77) Ibid. 582.
(78) Ibid. 603.
(79) Ibid. 615, 622.
(80) [1932] A. C. 562.

invitor to an invitee is, in my opinion, to give him a fair warning of any danger on the premises which he cannot be expected to foresee. Premises inevitably contain a great variety of dangers, some great, some slight, some usual, some unusual, and it is, in my opinion, a question of fact whether the danger is so slight or so usual that no warning is needed or so great or so unusual that the invitee with the actual knowledge of the premises which he is known by the invitor to possess ought, in the opinion of an ordinarily careful invitor, to be warned of it. The words of Atkin, J., in *Lucy* v. *Bawden* (81), approved by your Lordships' House in *Fairman* v. *Perpetual Investment Building Society* (82), appear to me directly applicable mutatis mutandis to the facts of the present case: " The danger, if any, was patent to everyone, " and the plaintiff gave evidence that she herself had complained " to the defendant's agent about it ".

The maxim volenti non fit injuria is a maxim which affords a defence to a person who has committed a breach of duty, but an invitor who invites someone on to his premises which are reasonably safe has committed no breach of duty, nor has he if the invitee knows the danger or has been adequately warned about it: see Salmond on Torts (10th ed.), p. 38.

With the greatest respect to Singleton, L.J., I cannot agree with his statement (83): " A danger which is unusual does not " become other than unusual merely because the person suing " knew of it before his accident. If it were otherwise, notice of " an unusual danger might of itself render the rule in *Indermaur* " v. *Dames* (84) wholly inapplicable, whereas notice is only an " element to be considered ". As I read the words of Willes, J., in *Indermaur* v. *Dames* (85), an occupier owes no duty to an invitee in respect of " usual " dangers, since the invitee is only entitled to expect that the invitor will take care to prevent damage from unusual danger, but " where there is evidence of " neglect ", that is to say, where there is danger which may be found by the tribunal of fact to be unusual, it is a question of fact whether reasonable care has been taken by notice, lighting, guarding or otherwise, and therefore there has been no neglect.

LORD MACDERMOTT. My Lords, the facts have already been stated and there is no need for me to rehearse them at length. But it may help to define the issue for determination if I begin with a reference to the salient features of the situation which has produced it.

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(81) [1914] 2 K. B. 318, 326.
(82) [1923] A. C. 74, 81.
(83) [1950] 1 K. B. 421, 428.
(84) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(85) L. R. 1 C. P. 274, 288.

The relationship between the appellants and the respondent was admittedly that of invitors and invitee, the respondent being employed as an electric welder upon the appellants' premises by the Thames Welding Co. Ld. in the performance of certain work which that company had contracted with the appellants to carry out. The invitation, therefore, was not contractual and no question of any contractual duty, express or implied, arises. The premises of the appellants, so far as material to this appeal, consisted of a staging in the fish hold of the *Valmont*, a trawler which they were reconverting after war service. The appellants were the occupiers of the trawler and as such retained control of the staging throughout. They, acting by their shipwrights, had laid it and they alone were entitled to re-lay or alter it. At the time of his accident and for some weeks previously the respondent had to use this staging in the discharge of his duties as a welder. In point of fact it afforded an inadequate footing for welders and must be regarded as continuously dangerous while the respondent was working upon it. In the Court of Appeal, Singleton, L.J., said (86): "In the condition in which it was the staging was defective, in that it was insufficient. There is no doubt of that. It could have been made satisfactory by the use of more deals—for example, by the use of a couple of cross boards. As it was, it constituted a danger which led to an accident to the plaintiff". That view was not challenged before your Lordships, nor was it suggested that the respondent had not taken due care for his own safety. Contributory negligence was, indeed, alleged in the defence, but Lynskey, J., did not deal with the plea and the evidence is insufficient to support it. It is also clear that the appellants must be taken to have known, through their servants, of the defective and dangerous condition of the staging and, further, that it could have been made reasonably safe and suitable for its purpose by the exercise of reasonable care on their part. This was not in dispute. As will be seen, the point which emerges respecting reasonable care is not whether the appellants in fact took such care but whether, in the circumstances, they were under a duty to the respondent to do so.

Two other matters must be mentioned to complete this summary and define the principal issue. First, the respondent was aware of the dangerous state of the staging and of the risk he ran in using it. And, secondly, he cannot, despite his knowledge, be taken as having freely and voluntarily agreed to accept that risk. Though volenti non fit injuria was not pleaded, Lynskey, J., indicates in one passage in his judgment (87) that, had it been necessary, he would have found against the respondent on this defence, and, thus encouraged, the appellants appear to have relied upon it to some extent in the Court of Appeal. At the Bar of this House, however, volenti as a defence was expressly disavowed. In truth the appellants could not well have done otherwise. It is settled law that, even in cases of accidental harm, knowledge of a risk does not necessarily import a willingness to bear it without compensation; and here the evidence which, for good reason, was not directed to this plea, comes nowhere near sustaining it.

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(86) [1950] 1 K. B. 421, 425–26.

Stated in general terms, the question, then, is whether an invitor can be held liable in tort for injury caused by the dangerous state of his premises, of which he knew or ought to have known, to an invitee who, though sciens, was neither volens nor careless for his own safety.

For the appellants it was contended that this question was governed by the leading case of *Indermaur* v. *Dames* (88) and that, when properly understood, the law there laid down required that it should be answered in the negative.

The essence of *Indermaur* v. *Dames* (89) lies in the well-known passage in the judgment of Willes, J., in the Court of Common Pleas in which he states the rights of the invitee. The passage is so directly in point that I must set it out even at the risk of being repetitive. It runs thus: " With respect to such a " visitor at least, we consider it settled law, that he, using " reasonable care on his part for his own safety, is entitled to " expect that the occupier shall on his part use reasonable care " to prevent damage from unusual danger, which he knows or " ought to know; and that, where there is evidence of neglect, " the question whether such reasonable care has been taken, by " notice, lighting, guarding, or otherwise, and whether there was " contributory negligence in the sufferer, must be determined by " a jury as matter of fact ".

This statement of the law was affirmed by the Exchequer Chamber and has long been regarded as an authoritative exposition of the duty owed by an invitor to his invitee. But for some time its meaning in one particular respect has been considered ambiguous by text writers and judges, and it is this ambiguity that your Lordships are now asked to resolve. The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge; but the inquiry is to ascertain the applicable rule of the common law and cannot, as I regard the position, be confined to a problem of construction. There is, however, no doubt as to the substance of the point which has arisen, whatever the apt way of describing it may be. It involves a choice between two views which, put briefly and in relation to the general question as I have stated it above, may be expressed thus:—

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(87) [1949] 2 K. B. 584, 590.

(88) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(89) L. R. 1 C. P. 274, 288.

(1.) the invitor owes no duty to an invitee who has knowledge or due notice of the relevant danger; and

(2.) the invitor's duty is to take reasonable care to protect his invitee from the relevant danger.

It will be convenient to discuss these views and their implications in turn, but before doing so I think it well to mention one or two general considerations which it may prove helpful to keep in mind.

The first is that the range of circumstance affecting the relationship of invitor and invitee is virtually infinite and generalizations based on some particular state of affairs must be advanced and regarded with caution. The next is that matters pertaining to this or that ground of defence may, in this field, readily lead to confusion in ascertaining the true character of the duty involved. For example, knowledge on the part of an invitee may contribute to the defeat of his claim in a variety of ways, as by showing that he was volens, or careless for his own safety, or, in some circumstances, that his invitor had in fact taken reasonable care for his protection; but it does not follow in any of these cases that such knowledge, if standing quite alone, would have been sufficient to absolve the invitor. It is one thing to say that an invitee's claim has failed in consequence of his knowledge and, as it seems to me, quite a different thing to say that because he had knowledge his invitor had no duty towards him. And lastly, the authorities cited by either side appear to offer no instance in which the present point was raised, debated and decided. In most of them the dicta relied upon, now supporting

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one view and now the other, are obiter and, no doubt for that reason, expressed on occasion perhaps less precisely than would otherwise have been the case. I shall refer to some of these decisions later but I do not think it necessary to examine them all. Having given them my careful attention I cannot but feel that the outcome of the present appeal must ultimately rest on principle rather than precedent.

Of the views propounded for your Lordships' consideration that which I have stated first was the whole basis of the appellants' case. Their submission accepted *Indermaur* v. *Dames* (90) as containing a complete statement of the applicable law and depended largely upon the meaning to be attached to Willes, J.'s use of the expression "unusual danger". Now, there can, I think, be little doubt that that expression was intended to exclude the common, recognizable dangers of every day experience inherent in premises of an ordinary type, such as the danger of working on a factory chimney or at the edge of a reasonably lit wharf. But it was not suggested that the staging in this case constituted a common or usual danger of that sort. What the appellants said was that the expression "unusual "danger" also connoted a danger which, from the point of view of the particular invitee, was unexpected and therefore unknown to him.

At the trial Lynskey, J., acceded to this contention and the heart of his judgment dismissing the claim may be found in one sentence in which he says (91): ". . . if an invitee does appre"ciate the existence upon the premises to which he is invited of "a danger and its nature and extent, it cannot be to him an "unusual danger". In other words, an invitee with full knowledge of the danger that causes him harm is owed no duty by his invitor and is therefore without remedy against him, whatever the circumstances. I must say that reasoning seems to me to rest on a very narrow ledge and to lay undue stress on the import of a single word in a judgment which, however outstanding, was certainly never intended to take its place in the statute book. But I find it also unsatisfactory on several broader grounds and these I shall now mention before referring to authority.

It may be that in speaking of unusual danger Willes, J., had in mind what was unusual for the particular invitee. That was the view of Phillimore, L.J., in *Norman* v. *Great Western Railway*

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(90) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(91) [1949] 2 K. B. 584, 589.

Co. (92), and, if I may say so, there is much to be said for it, provided it is not used to tax the invitor with liability for the consequences of some idiosyncrasy on the part of the invitee of which the invitor was ignorant and ought not to have known.

But I find difficulty in taking the next step and saying that a danger cannot be unusual for the particular invitee if it is known to him. Why should this be unless "unusual" is given a special and restricted meaning? A man working, for example, on a platform supported by a frayed rope, or at the unloading of a ship on fire, would surely never think of describing his danger as usual, no matter how well he appreciated the risk. Had the hole down which the plaintiff fell in *Indermaur* v. *Dames* (93) been in the immediate neighbourhood of his work, so as to constitute a continuing and obvious danger while he was doing his job with all due care, I venture to think that no one would have been more surprised than Willes, J., himself to learn that on the law as he stated it the danger was not unusual and no question of reasonable care on the part of the invitor could possibly arise.

It seems to me that the view propounded by the appellants can only be placed on a logical basis if in this particular branch of the law sciens can be said to come to the same thing as volens. But there is nothing in *Indermaur* v. *Dames* (93) to justify any such disregard of a distinction long recognized in English law and perhaps nowhere more clearly drawn than in the sphere of industrial relations. In *Letang* v. *Ottawa Electric Railway Co.* (94), the distinction was regarded by the Judicial Committee as material in determining the rights of an invitee and the correctness of that view is not, in my opinion, now open to doubt.

This last consideration leads to a further difficulty I have regarding the appellants' contention. If the invitee sciens is not necessarily volens as well, then, as I see it, the whole virtue of giving him notice of the danger, the whole relevance of knowledge on his part, must lie in his being in a position to keep clear of the danger once he knows of it. Now, it may well be that the fact that the present issue has emerged for decision so long after *Indermaur* v. *Dames* (93) can be accounted for by saying that in most cases of invitor and invitee the danger is, as it was there, avoidable from the point of view of an informed and reasonably careful invitee. In instances of that sort knowledge could be decisive without the necessity of choosing between the views propounded at your Lordships' Bar. But how can knowledge rank as a decisive criterion of responsibility—and that is what the appellants' contention amounts to—where, as here, the danger is constant and inescapable for the invitee, despite his knowledge, while he remains on the premises pursuant to his invitation? In such circumstances I find it difficult to discern any sound reason why knowledge per se on the part of the invitee should exonerate the invitor who is content to leave unabated, on the premises he controls, an abateable danger. On this ground the test of liability advocated by the appellants ought not, in my opinion, to be read into *Indermaur* v. *Dames* (95) if, as they have urged throughout, that decision states the whole duty of the invitor and is applicable irrespective of whether or not the invitee's knowledge can avert the peril.

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(92) [1915] I K. B. 584, 596.

(93) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(94) [1926] A. C. 725.

The appellants' proposition must also be considered with reference to the ambit of the relationship of invitor and invitee. The weight of authority favours the view that for the purposes of the law of tort—I do not refer to contractual obligations—the liability of an occupier to one who visits his premises must be determined according to whether the visitor is a trespasser, licensee or invitee. There is no fourth category conferring rights superior to those of an invitee for the accommodation of persons who, as members of the public, resort to the premises as of right, e.g., intending passengers entering a railway station: see *Norman* v. *Great Western Railway Co.* (96); the observations of Lord Hailsham, L.C., and Lord Dunedin in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (97); and, for a more recent instance, the decision of the Court of Appeal in *Sutton* v. *Bootle Corporation* (98), *per* Asquith, L.J. I think that this view must now be accepted as good law.

Mr. Nelson, indeed, did not seek to argue the contrary on behalf of the appellants, but he was constrained to admit that the result, if his main contention were sound, would be to produce an anomalous situation in certain events. I may illustrate this by an instance mentioned in the course of the debate. A, at the end of his day's work, repairs to the local railway station to get home. He goes to the ticket office by the usual and only means of approach. The roof overhead is in a dangerous state and bits of it are liable to fall at any moment. The railway company know of this and could readily avert the danger for those beneath by placing a temporary screen under the defective part. But all they do is to post a notice describing the danger in clear terms. A reads and understands this before he enters the perilous area, but hurries on in order to get his ticket and is hurt by a piece of falling glass. He was not volens or careless. Yet, if the appellants are right, he was owed no duty by the company and has no redress.

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(95) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(96) [1915] 1 K. B. 584.

(97) [1929] A. C. 358, 364, 371.

(98) [1947] K. B. 359, 366.

My Lords, if the law confers that sort of immunity on occupiers of premises, it is, to my mind, inadequate and open to grave criticism. I do not forget the unwisdom of building principles on hard and rare instances. But I do not think the illustration I have given is fanciful or remote from the run of ordinary affairs except perhaps in this, that there must be many responsible occupiers who, in such circumstances, would feel they had done wrong if they had not done more. In applying the common law to a given state of facts upon which there is no binding authority it is permissible and proper, in choosing between two possible views, to have regard to the reasonable requirements of the community which the law has to serve. Such a process demands great caution and is not necessarily conclusive. But if one view leads to a narrow and unreasonable rule and the other does not, it is a point in favour of the latter. The matter to which I have been referring is, therefore, in my opinion, one to be taken account of in weighing the appellants' case. Without being decisive it appears to me to bear against it.

The same may, I think, be said of another consideration to which I will now refer. In the Court of Appeal Singleton, L.J., held for the respondent on two grounds. He first of all rejected the view of *Indermaur* v. *Dames* (99) propounded by the appellants and found them in breach of the duty laid upon invitors by that decision; and, secondly, he was of opinion, on the strength of the general principles enunciated by Brett, M.R., in *Heaven* v. *Pender* (1), and by Lord Atkin in *Donoghue* v. *Stevenson* (2), that the present appellants were under a duty to use ordinary skill and care in the provision of the staging. It is no doubt true that, on occasion, responsibility at law may be imposed concurrently by different rules, as, for example, where the claim sounds in both negligence and nuisance. But I am not disposed to think that the liability in tort of an invitor to his invitee comes from

(99) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(1) (1883) 11 Q. B. D. 503.

(2) [1932] A. C. 562.

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more than one quarter. I think that where there is such liability it must be found in the doctrine of *Indermaur* v. *Dames* (3). That, however, is not to say that the broad concept of neighbourly duty exemplified by *Heaven* v. *Pender* (4) and *Donoghue* v. *Stevenson* (5) is entirely irrelevant to the present investigation. The question, as I see it, is whether *Indermaur* v. *Dames* (3) also exemplifies that concept. If the respondent is right it does, for the duty then lies entirely in the taking of reasonable care. On the other hand, the position, as it seems to me, is essentially different if the appellants are right. It is correct to say that they do not deny the need for some initial care. The invitor's liability being in respect of danger of which " he knows or ought to know ", he is at least under an obligation to use reasonable care to make himself aware of defects that may injure his invitee. But that done, he may, according to the appellants, discharge his obligation—or perhaps I should say end it—merely by giving the invitee due notice of the danger—and even that is unnecessary if the invitee is already aware of it. That might possibly be regarded as a rational form of obligation if sciens had to be treated as the equivalent of volens in this sphere. But otherwise it seems strange and unsuited to the relationship concerned which, when all is said, remains based on common interest; almost as strange, indeed, as would the duty of a motorist become if, having seen the pedestrian in his path and given him the loudest of warnings, he was then absolved from taking any further step to avoid a collision. All this, of course, is itself inconclusive. Our judicial process cannot eliminate what is obsolete and unsatisfactory once it has become established law—as witness the recent abolition by statute of the doctrine of common employment after much judicial denunciation. But the question here is open. Your Lordships' decision will establish what was not established before, and that, as it seems to me, makes a comparison between the broad merits of the rival contentions both relevant and right.

I come now to authority as invoked by the appellants. For the reasons already mentioned I confine myself to the cases that lend or appear to lend most support to their submission. Pride of place must go to certain statements made in the Court of Appeal in *Brackley* v. *Midland Railway* (6). Bankes, L.J., says this (7): " I am prepared to deal with this case upon the assumption, " without deciding it, that there was an invitation by the railway

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(3) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(4) 11 Q. B. D. 503.

(5) [1932] A. C. 562.

(6) 85 L. J. (K. B.) 1596.

(7) Ibid. 1608.

"company to this particular plaintiff to use this footbridge as an "access to the platform to which she desired to go. Now, in those "circumstances, what was the duty of the railway company to the "plaintiff? A great many expressions have been used in different "cases with regard to that duty; but I think that the duty was "expressed in *Norman* v. *Great Western Railway Co.* (8) and in "*Cavalier* v. *Pope* (9) in the best and the simplest way—that is, "that the duty which arises out of the relationship of an invitor "and an invitee is a duty in respect of any danger which was "known to the defendants, or ought to have been known to the "defendants, and of which the plaintiff had either no knowledge "or notice. If that is a correct statement of the law, it follows "that in any case, when the proper conclusion upon the evidence "is either that the defendants did not know or ought not to have "known the danger, or that the plaintiff did know or had notice "of the danger, the defendants' duty is not established; and the "duty not being established, no question can arise of any breach "of their duty, and no question will arise as to any necessity for "a defence on the part of the defendants arising out of contributory negligence or otherwise".

Swinfen Eady, L.J., spoke to the same effect, and I think that Phillimore, L.J., agreed, though he said little on this aspect of the matter. The view thus stated was obiter, but, as expressed, it entirely upholds the appellants' submission and cannot be lightly disregarded. In my opinion, however, there is good ground for saying that it was not an accurate exposition of the law. On the supposition that the plaintiff was their invitee the company in that case had contended throughout that she was volens, and, as I read the report, it seems that both Swinfen Eady and Phillimore, L.JJ., were prepared (on this supposition) to hold her so, for they were at pains to distinguish *Osborne* v. *London & North Western Railway Co.* (10). When one studies the arguments and judgments in *Brackley* v. *Midland Railway* (11) it is, I think, reasonable to suppose that Bankes, L.J., was not, in the passage from his judgment which I have quoted, directing his mind to the important distinction between knowledge simpliciter and the knowledge which in special circumstances may found a plea of volenti non fit injuria.

This view is fortified by the reliance placed by Swinfen Eady and Bankes, L.JJ., on *Cavalier* v. *Pope* (12). The only relevant

(8) [1915] 1 K. B. 584.
(9) [1906] A. C. 428.
(10) (1888) 21 Q. B. D. 220.
(11) 85 L. J. (K. B.) 1596.
(12) [1906] A. C. 428.

passage in the opinions delivered in that case is to be found in the speech of Lord Atkinson who, on referring to the principle of *Indermaur* v. *Dames* (13), says (14): " . . . one of the essential " facts necessary to bring a case within that principle is that the " injured person must not have had knowledge or notice of the " existence of the danger through which he has suffered. If " he knows of the danger and runs the risk he has no cause of " action ". I see no ground for thinking that the Court of Appeal in *Brackley* v. *Midland Railway* (11) intended to put the test any higher than it was put by Lord Atkinson. But the last sentence of this passage which, it may be observed, was quoted fully by Swinfen Eady, L.J., marks the distinction to which I have just referred by the significant words " and runs the risk ". I cannot accept the view that Lord Atkinson meant that an invitee sciens was necessarily in the same position as an invitee volens, and, if that be so, I do not think there is anything in *Brackley* v. *Midland Railway* (11) to sustain the appellants' case.

I must also refer to *Fairman* v. *Perpetual Investment Building Society* (15). It was there decided that the plaintiff was a licensee, not an invitee; but such relevance as this case has lies not in what it decided but in the inference to be drawn from certain observations made by Lord Atkinson and Lord Sumner to the effect that even as an invitee the plaintiff could not have recovered. What Lord Atkinson said concerning the plaintiff was this (16): " The findings of fact of the learned judge who tried " the case, Shearman, J., disentitled her, in my view, to any " relief either in the character of licensee or in that of invitee " of the defendants ". Lord Sumner also considered that the findings of Shearman, J., should be accepted; and then, after stating his opinion that the claimant was a licensee, he added (17): " In this particular case, however, it makes no difference to the " liability whether she was the defendants' licensee or their " invitee. Under the present circumstances the obligation was " only not to lay a trap for her, and none was laid ".

The defect which caused the plaintiff, Lilian Fairman, to fall down the stairs was found to be obvious and such as could have been seen by her had she looked, and the suggestion based on the excerpts I have cited was, as I understand it, that they indicated acceptance of the proposition that an invitor owed no duty to an invitee who knew or ought to have known of the danger or defect in question. I consider this suggestion ill-founded. Apart altogether from the obiter nature of the remarks quoted, and the fact that the precise point with which your Lordships have now to deal was not raised in *Fairman's* case (15), I do not think that either Lord Atkinson or Lord Sumner intended to assert any such general proposition. The findings to which Lord Atkinson referred included findings to the effect—and here I quote Lord Atkinson's own words (18)—" that there was no negligence on the part of " the landlord or of the caretaker in not observing the condition " of the stairs, reporting it and getting them repaired ", and, again (19), that he, the trial judge, did not " think he could " possibly find that the staircase as a whole or that particular " place could be described in plain English as dangerous ".

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(11) 85 L. J. (K. B.) 1596.

(13) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(14) [1906] A. C. 428, 432.

(15) [1923] A. C. 74.

(16) Ibid. 86.

(17) Ibid. 92.

It may be that this latter finding must be linked with the view that the claimant failed to see the obvious and was therefore the author of her own misfortune. But whether that be so or not, the other finding meant that the occupier did not know and ought not to have known of the defect, and on that ground alone the claim of an invitee was bound to fail. The part stressed in what Lord Sumner said was, of course, the phrase " . . . the obligation " was only not to lay a trap for her . . .". Even if these words are to be isolated from their context I would be slow to conclude that Lord Sumner intended to confine the rule in *Indermaur* v. *Dames* (20) to an obligation not to lay traps for invitees, irrespective of the circumstances and of whether the danger was avoidable or not. But, in fact, Lord Sumner was careful not to make any such sweeping statement. The immediately preceding words, " Under the present circumstances . . .", were clearly meant to have a limiting effect. I confess the findings of fact in *Fairman's* case (21) cause me some difficulty and, for that reason, I am not entirely clear as to what exactly Lord Sumner intended to include in " the present circumstances "; but I think he must, at least, have had in mind the plaintiff's familiarity with the stairs, that they were well lighted and their condition plain to be seen and, also—and this I think was implicit throughout the case—that the kind of defect which had appeared was easily avoidable by people using the stairs. For these reasons I am unable to find support for the appellants' contention in *Fairman* (21).

The appellants also relied on certain observations of Lord

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(18) [1923] A. C. 74, 87.

(19) Ibid. 88.

(20) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(21) [1923] A. C. 74.

Maugham in *Griffiths* v. *Smith* (22). In that case the appellant, Mrs. Griffiths, had accepted an invitation by the managers of the school attended by her son to an exhibition on the first floor of the school premises. The floor was in a dangerous condition and collapsed during the display causing Mrs. Griffiths serious injuries. The material part of Lord Maugham's speech reads thus: "The "appellant had to show that the managers were in occupation "and control of the premises, and were therefore under a common "law duty to the invitee to take reasonable care to prevent injury "to the latter from a hidden danger of which as occupiers they "should have been aware, or to warn the invitee of the existence "of the danger. Thus the claim is simply on the well-known "principle of *Indermaur* v. *Dames* (23)".

It is to be noted that the managers did not contest the finding that they had failed in their duty to the appellant. The only issue was whether they were protected by the Public Authorities Protection Act, 1893. As well as being obiter the passage quoted cannot, therefore, be regarded as having been directed in any way to the question which your Lordships have here to consider. In the circumstances I am in some doubt whether it can reasonably be taken as indicating more than that, in the particular instance, the managers might have discharged their duty either by removing the danger or by giving warning of it; and that is very far from saying that in any event and to any invitee warning is always enough. If, however, the passage is to be read as stating the substance of the rule in *Indermaur* v. *Dames* (23), it would lend support to the appellants' contention, for so read it limits the rule to hidden dangers, and dangers cease to be hidden when by warning or otherwise they become known.

But if that is what Lord Maugham meant, I am, with great respect, unable to agree. Had Willes, J., intended to confine the liability of invitors to hidden dangers, it may, I think, be presumed that he would have said so, and certainly that he would not have employed the word "unusual" for the purpose. Further, the terms he chose to use (24), particularly with regard to what he described as "the question whether such reasonable care has "been taken by notice, lighting, guarding or otherwise . . ." seem to me to suggest that he would have been content in appropriate cases to leave it to a jury to find as a matter of fact whether the giving of notice amounted to the taking of reasonable care. That view, resting as it does on the text of the judgment, ought not to exclude other considerations; but, if well founded, it reaches beyond the immediate point towards the heart of the controversy for it means, not only that Willes, J., had more in mind than dangers which are hidden (and which therefore pass out of that category when revealed), but that the ultimate test he considered applicable to all cases within the rule was one of reasonable care.

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(22) [1941] A. C. 170, 182.

(23) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(24) L. R. 1 C. P. 274, 288.

I turn next to the view advanced by the respondent. Is the invitor's duty one of taking reasonable care to protect his invitee from the relevant danger while the invitation subsists and the invitee is on the premises? This view also finds support in various dicta, usually obiter, to be found in the reports. Thus, " . . . it was at least a duty to take reasonable care that their " premises were reasonably safe for persons using them in the " ordinary and customary manner and with reasonable care "— a passage from the judgment of Bray, J., in *Norman* v. *Great Western Railway Co.* (25), approved in the Court of Appeal by Buckley, L.J., who added (26): " That statement of the duty is, " I think, correct, and it is not a larger duty than that in *Indermaur* v. *Dames* (23)". " The highest duty exists towards " those persons who . . . are present by the invitation of the " occupier. Towards such persons the occupier has the duty of " taking reasonable care that the premises are safe "—*per* Lord Hailsham, L.C., in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (27); " Towards an invitee the occupier has the duty " of taking care that the premises are reasonably safe "—*per* Goddard, L.J., in *Haseldine* v. *C. A. Daw & Son Ld.* (28); " Their duty to their invitee was to use reasonable care to " prevent damage of which they knew or ought to have known " —*per* du Parcq, L.J., in *Woodward* v. *Mayor of Hastings* (29). In *Letang* v. *Ottawa Electric Railway Co.* (30), Lord Shaw, delivering the judgment of the Judicial Committee, said that the defendant company, having invited the injured person to use the access in question, " were accordingly bound to keep " it reasonably safe ". That statement certainly was not obiter for, once the defences of volenti and contributory negligence had been disposed of, the appeal turned on it. But, though the injured person there must have been sciens to some

(25) [1914] 2 K. B. 153, 163.
(26) [1915] 1 K. B. 584, 594.
(27) [1929] A. C. 358, 364–5.
(28) [1941] 2 K. B. 343, 374.
(29) [1945] K. B. 174, 180.
(30) [1926] A. C. 725, 732.

extent, the present issue was not in debate. *Letang's* case (31) therefore, while more directly in point than the other cases to which I have just referred, cannot be regarded as a coercive authority on this aspect. Its prime importance in this appeal lies in the distinction it emphasizes between sciens and volens.

My Lords, it will be observed that the view for which the respondent contends has not always been precisely echoed in the supporting dicta of which I have given examples. And I think that, in so far as the duty of the invitor has been described as a duty to take reasonable care that his premises are reasonably safe, it has been put too high to be accurate as a general proposition, even if the respondent is right. No doubt, on his submission, the duty falling on the invitor would, on occasion, be properly so described. But occupiers would be placed in an intolerable position if on *all* occasions their obligation to invitees was of that nature and they had to make their actual premises reasonably safe irrespective of whether due and timely warning or other precaution might suffice to avert the danger. I think it is clear from the terms in which Willes, J., spoke that, if the respondent is correct in the substance of his contention, the duty of an invitor, stated generally, is to take reasonable care to prevent damage to his invitee from the relevant danger—and that does not necessarily and invariably mean making the premises reasonably safe.

It remains to choose between these conflicting views. In my opinion, that propounded by the respondent is to be preferred. It accords better, as it seems to me, with the language employed by Willes, J., in *Indermaur* v. *Dames* (32), including his use of the expression "unusual danger". It respects the settled distinction between sciens and volens in this branch of our jurisprudence, a distinction which the appellants' contention would, in effect, obliterate. It provides a rational criterion of responsibility over a wider range of circumstance, being equally applicable to avoidable and unavoidable dangers and to invitees of all kinds and degrees. And, not least, though in a sense this is but to enlarge on what I have just said, it applies to a relationship which, as already observed, is infinitely varied in character, a test of liability which is correspondingly flexible and adaptable. For what is reasonable in any given case must depend on all the relevant circumstances, including such factors as the nature of the invitation, the nature of the danger, the knowledge of the invitee, and the practicability of the possible means of removing or reducing the risk. So, in some instances, notice may suffice—in certain cases, indeed, such as those relating to dangers which lurk in navigable waters, notice may be the usual as well as the best means of protecting the invitee; in others fencing, or watching, or repair, or reconstruction may be requisite. And lastly, I see nothing in all this to bear harshly on the occupier. He controls the premises, he serves his own interest by the invitation, he has left to him all the pleas open to one accused of negligent conduct. Why should he be exonerated, or partly exonerated, from the duty of taking reasonable care? I have been unable to find any satisfactory answer to that question in principle or authority.

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(31) [1926] A. C. 725.

(32) L. R. 1 C. P. 274, 288.

My Lords, I have already said enough to apply the view I favour to the facts of this particular case. Had the appellants taken due care for the respondent's safety they would have taken steps to make the staging adequate for its purpose. They did nothing and should, accordingly, be held liable.

For these reasons I am entirely in agreement with the conclusion reached by the Court of Appeal. I would, therefore, dismiss this appeal.

Lord Reid. My Lords, the relevant facts in this case are simple. The respondent sustained injuries without negligence on his part. Those injuries were caused by the state of the appellants' premises being so unsafe that an accident could and did occur in spite of the respondent having full knowledge of the danger and in spite of the respondent having taken proper care for his own safety. The respondent was a servant of a subcontractor. He had no contract with the appellants. His position was simply that of an invitee, the appellants being the invitors. The respondent had been working at the place where the accident happened for some considerable time before his accident and the danger was obvious to him: indeed it would have been obvious to any ordinary person. The appellants must be taken to have been aware of the danger and there is nothing to suggest that there would have been any difficulty in making the place reasonably safe. The place was under the control of the appellants and the respondent had no right to make any alteration to diminish the danger.

The decision of this case depends, in my judgment, on the question whether the duty of an invitor to an invitee can never be more than to see that the invitee is fully aware of the dangerous state of premises which he is invited to use, or whether, notwithstanding that his invitee has such knowledge, the invitor can ever be under a duty to take care to make his premises reasonably safe for the use which he invites his invitee to make of them. If such a duty can exist in any circumstances the facts here are such that in my opinion it must exist in this case.

This case was argued, I think rightly, on the footing that this question is still an open question and therefore I think that it should first be considered as a question of principle. I do not doubt that the law is now firmly established that a person who comes to premises occupied by another with whom he has no contractual relation must be either an invitee, a licensee, or a trespasser. The respondent here was undoubtedly an invitee. There was a danger on the appellants' premises and the first question is whether the existence of that danger created any duty at all towards their invitee. If it did it will then be necessary to inquire what was the nature of that duty.

There are many dangers the existence of which creates no duty at all to an ordinary invitee. (I express no opinion about a case when an invitee has some special quality.) These are generally referred to as dangers which are not " unusual ". Such dangers can be found in most industrial premises and indeed in private houses: the roof of a house is often a dangerous place. Such dangers are well known: either they cannot be removed, or their removal is so difficult that in practice reasonable people do not remove them. If removal of a danger is easy it could hardly be a usual danger, because reasonable people who are careful of the safety of others would remove such dangers from their premises. The danger in this case was not one commonly found and it was easy to remove, so at first sight it would seem clearly to fall within the class of dangers the existence of which creates a duty. But it is said that a danger unusual in this sense may become usual for a particular invitee by his becoming accustomed to it and that when that happens the invitor ceases, as regards that invitee, to have any duty.

I have not observed any case in which this point was taken before *Norman* v. *Great Western Railway Co.* (33). In that case the plaintiff's horse and cart sustained damage in a yard belonging to the company. The plaintiff was an invitee and it was held that an invitee of a railway company had no higher right than an invitee of any other invitor. It was held that no breach of duty causing the accident had been proved, but in the course of his judgment Phillimore, L.J., dealt with the question whether the premises were reasonably safe and held that that meant reasonably safe for the plaintiff. He said (34): "I am not certain that "a way to avoid misapprehension which might arise from the use "of the words 'unusual danger'—which means, in my opinion, "danger unusual for the particular person—might not be found "by substituting the word 'unexpected' for 'unusual'. It is "not a question whether the danger is unusual with regard to all "the world, but whether it is unusual with regard to the individual complainant. In other words, in analysing the expression 'reasonably safe' one must take into account what is "called in modern parlance the personal equation: what may not "be safe for one person may be safe enough for the persons who "frequent particular business premises. For instance, in loading "a ship in a dock a gangway consisting of a plank without a "handrail may safely be provided, though its narrowness or slope "may be such that ordinary persons, not accustomed to ships, "might not find it easy to use, because the stevedore or seamen "who are to use it can use it safely. The gangway has to be "safe for the class of persons who use it on business, and so far "as any complainant is concerned it has to be reasonably safe for "him. If it is safe for him, it does not matter whether or not "it is safe for anybody else. It is for that reason that the "element of knowledge comes in".

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(33) [1915] 1 K. B. 584.

Pickford, L.J., agreed with this explanation of the word "unusual", but it must be noted that immediately before doing so he had cited with approval passages from the judgments of Lush and Bray, JJ., in the court below (35). Lush, J., had said (36): "I think it is not accurately said that the defendants "are free from liability merely because there was no hidden or "concealed trap", and Bray, J., had said (37): "It was at "least a duty to take reasonable care that their premises were "reasonably safe for persons using them in the ordinary and "customary manner and with reasonable care".

I agree with Phillimore, L.J., at least to this extent: in considering whether a danger is usual or unusual you must have regard to the nature of the place where it is and to the apparent experience of the invitee. A danger may be usual for a stevedore but quite unusual for an ordinary tradesman. But in this case Lynskey, J., went considerably further than that. He appears

(34) [1915] 1 K. B. 584, 596.
(35) Ibid. 598.
(36) [1914] 2 K. B. 153, 160.
(37) Ibid. 163.

to have taken the view that although the danger might be unusual for the particular invitee when he first arrived at the place it would become for him a usual danger when he appreciated it.

Lynskey, J., said (38): " The duty to an invitee is stated in " that oft-quoted passage from the judgment of Willes, J., in " *Indermaur* v. *Dames* (39), and is: ' That he, using reasonable " ' care on his part for his own safety, is entitled to expect that " ' the occupier shall on his part use reasonable care to prevent " ' damage from unusual danger, which he knows or ought to " ' know; and that, where there is evidence of neglect, the " ' question whether such reasonable care has been taken, by " ' notice, lighting, guarding, or otherwise, and whether there " ' was contributory negligence in the sufferer, must be deter- " ' mined by a jury as matter of fact '.

" From this passage it seems clear that the only duty imposed " on the invitor, or occupier, is to prevent damage from unusual " danger. This, of course, raises the question of what is unusual " danger. Is it danger unusual generally, or is it danger unusual " in premises of the type, description and use, to which the " invitation is extended, or is it a danger unusual from the point " of view of the particular invitee, regard being had to the type, " description and use of the premises to which he has been " invited? In my view ' unusual danger ' means a danger " unusual from the point of view of the particular invitee: see " Phillimore, L.J.'s judgment in *Norman* v. *Great Western Rail-* " *way Co.* (40). It must be, from his point of view, unexpected " in the particular circumstances in which he is availing himself " of the invitation. It may be that other persons might expect " such dangers, or might know of their existence in the premises " upon which he goes, but if he, acting reasonably, and exercising " due care for his own safety, did not appreciate the existence of " the danger or its nature, or its extent, it would be to him an " unusual danger. On the contrary, if an invitee does appreciate " the existence upon the premises to which he is invited of a " danger and its nature and extent, it cannot be to him an " unusual danger ".

I do not agree with that, for two reasons: in the first place it would be contrary to ordinary principles that the question whether one person owes a duty to another should depend not on objective

(38) [1949] 2 K. B. 584, 588.

(39) L. R. 1 C. P. 274, 288; L. R. 2 C. P. 311.

(40) [1915] 1 K. B. 584, 596.

considerations or on facts which he can ascertain, but on the state of mind of that other person, which may well be unknown to him. And secondly, what is the position to be if the danger is highly unusual in the ordinary sense but is at once appreciated by the invitee when he sees it? If "usual" is an apt word, as I think it is, to denote the class of dangers which give rise to no duty, it would surely be a misuse of language to say that something hitherto unknown has become "usual" the moment it is seen. Mr. Nelson in his admirably candid argument did not attempt to support this. He simply put the argument in this way: as soon as a danger is known to and appreciated by the invitee the invitor's duty is at an end. But that rather goes to the nature and extent of the duty than to the question whether there is any duty in respect of a particular danger.

I think that in this case there was a duty in respect of the danger which caused the accident and that the real question is what was the nature and extent of that duty. Three views have been suggested. In the first place it has been said that the duty of an invitor is to make his premises reasonably safe (at least in so far as that is practicable). Secondly it can be said that the invitor has the option to make his premises reasonably safe or to give to his invitee adequate notice of the danger, and that if he adopts the latter alternative his duty is at an end. Or thirdly his duty can be said to be to use reasonable care to prevent damage to his invitee.

I think that the first of these clearly puts too high a duty on the invitor. It is easy to imagine many situations which are highly dangerous to a person without knowledge of the danger but which to a person with such knowledge become safe; the danger is so situated that the invitee can continue to accept the invitor's invitation and at the same time without difficulty avoid the danger. He can only suffer damage from the danger after he knows about it if he acts in complete disregard for his own safety. In such a case I can see no reason why an invitor should have to do any more than see that his invitee has the necessary knowledge. Reasonable care for the safety of the invitee could not require more.

But there are other cases where full knowledge of the danger gives no assurance of safety. If a man is invited to work for a long period in a place where a slight slip on his part may lead to disaster, the fact that he realizes the danger goes but a short way to assure his safety. So I find it necessary to examine somewhat narrowly the view that an invitor is entitled to discharge his duty to his invitee merely by giving notice of the danger when it would be easy for him to ensure his invitee's safety by removing the danger. In such a case, if the true view is that it is the duty of the invitor to use reasonable care to prevent damage to the invitee, then it would be his duty to remove the danger. If in the present case it was the duty of the appellants to use reasonable care to prevent damage to the respondent while he was on their premises in response to their invitation doing work which it was their common interest to have done, then in my judgment the appellants clearly failed in their duty; on the other hand, if the appellants' duty to the respondent came to an end once he had knowledge of the danger, then of course the appeal must succeed.

It is convenient at this point to deal with arguments based on the case of *Donoghue* v. *Stevenson* (41). In that case the defender had parted with control of a dangerous object, but he was nevertheless held liable to the person ultimately injured by it. It is plain that a person who has parted with control cannot have the same duty as a person who retains control and can therefore remain under a continuing duty down to the time when damage is suffered. I can find nothing in this class of case which assists towards the determination of the question now in issue.

I think that the authorities on the duty of an invitor to his invitee can be summarized in this way. The point at issue in this case has never been the subject of decision and there is no clear indication that it has been specifically considered in the course of any case. Text writers of authority have considered the question but have expressed no decided opinion. There are a number of cases in which brief general statements of the duties of an invitor have been made. Many of these do not appear to be intended to be more than adoptions or paraphrases of the judgment of Willes, J., in *Indermaur* v. *Dames* (42). Some tend to give a wider interpretation of that judgment by emphasizing the duty to take care: others tend to give a narrower interpretation by emphasizing the importance of giving notice of concealed dangers.

As almost all discussions of this subject start from the judgment of Willes, J., and particularly from that passage in the judgment which I have already quoted, I must first state what I conceive to be its meaning and effect. I do not for a moment

(41) [1932] A. C. 562.

(42) L. R. 1 C. P. 274.

doubt the authority of this passage. Its words have clearly been chosen with great care, and if one were dealing with facts at all comparable with the facts in that case, or indeed with any situation of a kind which Willes, J., can be supposed to have had in mind, it would hardly be necessary to go beyond his judgment.

But I do not think that this judgment was meant to be or can properly be used as a codification of the law. In dealing with a situation different from anything contemplated in that judgment I do not think that it is very helpful to analyse that passage as if it were a section in an Act of Parliament. I prefer to seek the principles underlying the judgment, which are, I think, of general application. In the first place I think that the judgment recognizes that it is only with regard to a certain class of dangers that any duty arises. I have stated my view about that and I do not think that my view conflicts in any way with this judgment. In the second place Willes, J., does not state the invitor's duty alternatively as a duty either to take care or to give notice. He states the invitor's duty as a general duty to use reasonable care and he does not lay down any particular method as one which an invitor is in all circumstances entitled to adopt in discharging his duty: on the contrary he mentions a variety of methods (43), "notice, lighting, guarding, or otherwise", and must, I think, have had in mind that such method should be adopted as reasonable care in the circumstances requires. I think that his meaning is that what reasonable care requires in any particular circumstances is a matter of fact. Therefore I can find no support in this judgment for the view that as a matter of law the invitor always has the option to give notice and do nothing more.

There are, it is true, many cases in which the duty has been stated in an alternative form, that the invitor must either make his premises safe or give notice of unusual dangers. It appears to me that those cases are of one or other of two kinds. In some of the cases the circumstances were such that the invitor was entitled to assume that once the invitee knew of the danger he would avoid it. In others a principle similar to that underlying the defence of volenti non fit injuria was assumed to be applicable: it seems to have been held that, if an invitee continues to accept the invitor's invitation after he knows the danger, the law must infer that he has agreed to accept the risk from that danger.

I shall deal with the former class of case first. Cases of this kind have arisen in a wide variety of circumstances. Those

(43) L. R. 1 C. P. 274, 288.

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dealing with invitation to ships are as good an example as any. The leading case on invitation to ships is *The Moorcock* (44). In that case wharfingers invited a ship to discharge at their jetty. They did not control the bed of the river adjoining the jetty where the ship must lie, but they took no step to ascertain whether it was a safe place. The vessel lying at the jetty grounded and sustained damage from the uneven condition of the bed of the river. The wharfingers were found liable for the damage.

Bowen, L.J., said (45): "Assume that the berth outside had "been absolutely under the control of the owners of the jetty, "that they could have repaired it and made it fit for the purpose "of the unloading and the loading. If this had been the case, "then the case of *The Mersey Docks Trustees* v. *Gibbs* (46) shows "that those who owned the jetty, who took money for the use "of the jetty, and who had under their control the locus in quo, "would have been bound to take all reasonable care to prevent "danger to those who were using the jetty—either to make the "berth outside good, or else not to invite ships to go there—"either to make the berth safe, or to advise persons not to go "there". Then he pointed out that the berth outside was not under the actual control of the jetty owners, but nevertheless they were not relieved of all responsibility. He said (47), "if "they let out their jetty for use they at all events imply that "they have taken reasonable care to see whether the berth, which "is the essential part of the use of the jetty, is safe, and if it is "not safe, and if they have not taken such reasonable care, it "is their duty to warn persons with whom they have dealings "that they have not done so". This case is not directly in point, but it has been used as if the passage which I last quoted was equally applicable in a case where the defendant is in control of the place where the danger is. I think that an examination of the case makes it plain that this is not so.

In *Tredegar Iron & Coal Co. Ld.* v. *Calliope (Owners)* (48) Lord Halsbury, L.C., after referring to *The Moorcock*, said (49): ". . . either he ought not to have invited the vessel or he ought "to have informed the vessel what the condition of things was "when she was invited, *so that the injury might have been* "*avoided*". The italics are mine. Lord Halsbury must, I think, have taken the view that in that case warning would have led to safety; and, as I have said, I have no doubt that warning

(44) 14 P. D. 64.
(45) Ibid. 69.
(46) (1864) L. R. 1 H. L. 93.
(47) 14 P. D. 64, 70.
(48) [1891] A. C. 11, 14.
(49) 14 P. D. 64.

in such a case is all that reasonable care for the safety of the invitee requires.

In *Anchor Line (Henderson Brothers) Ld.* v. *Dundee Harbour Trustees* (50) two ships sustained damage owing to the unsafe state of the approaches to Dundee harbour. Viscount Haldane said: "Their legal position would thus be like that of the plaintiff "in the well-known case of *Indermaur* v. *Dames* (51), and they "would be entitled to look for the discharge of a duty resting on "the respondents to exercise reasonable care to avert peril to "them from any unusual danger of which the respondents knew "or ought to have known. It is important to have this in mind, "inasmuch as it bears on the extent of the counter-duty of those "approaching the harbour as regards the standard of skill required "of them in navigating their vessels in the course of such "approach. The latter, approaching under such an invitation "as I have referred to, are entitled to rely on care having been "taken by those inviting them to avert any unusual danger of "which they are cognisant. I think that the duty imposed on "the Harbour Trustees arose, not only under the principle of "invitation, but as the result of s. 92 of the Act of 1911 already "quoted. On the other hand, those approaching with their "vessels must, notwithstanding their right to rely on such care "having been exercised, use care on their own part not to incur "peril rashly". Here again it seems to me that the harbour authority would be entitled to expect that a ship being warned of a danger would avoid it, and therefore warning would be an adequate discharge of their duty. I do not think it necessary to consider further instances of this kind.

Cases where the defendant was entitled to assume that warning would be an adequate protection are in my opinion clearly distinguishable from the present case. In this case the respondent returned to the dangerous place day after day, and the appellants knew that the respondent's knowledge of the danger was no protection to him. How then does it come about that the appellants' duty towards him had ceased, unless indeed it has to be said that the only inference which the law permits to be drawn from such circumstances is that the man by returning to his work in knowledge of the danger must be held to have accepted the risk and relieved the appellants of their duty to take care? Some of the expressions of opinion that warning is sufficient appear to be based on the view that if the invitee is warned or gets to know of the danger he must then elect either to continue to accept the invitation at his own risk or to go away, and that if in knowledge of the danger he continues to accept the invitation he will be deemed to have accepted the risk of injury to himself.

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(50) 1922 S. C. (H. L.) 79, 83; 38 T. L. R. 299, 300.

(51) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

In *Cavalier* v. *Pope* (52) Lord Atkinson said: "It is, I think, "clear that the case does not come within the principle of *Indermaur* v. *Dames* (51) and the cases which followed it down to "*Earl* v. *Lubbock* (53), because one of the essential facts necessary to bring a case within that principle is that the injured "person must not have had knowledge or notice of the existence "of the danger through which he has suffered. If he knows of "the danger and runs the risk he has no cause of action".

That statement was obiter because the case was decided in favour of the landlord against the tenant's wife on a different ground—that she, not being a party to the contract, had no right to require the landlord to repair the premises. Moreover the landlord was not in occupation of the place where the danger was, and it has since been decided that, even if damage is suffered by an invitee of the tenant in a place which the landlord does occupy, that invitee is only the licensee of the landlord: *Fairman* v. *Perpetual Investment Building Society* (54); *Jacobs* v. *London County Council* (55).

But Lord Atkinson's dictum has been quoted with approval in later cases. For example, it was so quoted by Swinfen Eady and Bankes, L.JJ., in *Brackley* v. *Midland Railway* (56). That was a case where an intending passenger crossing a bridge slipped on ice which was an obvious danger. It was held that the bridge was part of a highway but that, even if the plaintiff had been an invitee of the company, she could not recover because, knowing the danger, she had run the risk. The case was distinguished from *Osborne* v. *London & North Western Railway Co.* (57), because in *Osborne's* case (57) the defence volenti non fit injuria had failed.

It is, I think, clear that the court in *Brackley's* case (56) took the view that an invitee who knew the danger was presumed to have undertaken the risk. It is at this point that I think that the most difficult question in this case arises. There is no doubt that when the defence volenti non fit injuria is pleaded it is now

(51) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(52) [1906] A. C. 428, 432.
(53) [1905] 1 K. B. 253.
(54) [1923] A. C. 74.
(55) [1950] A. C. 361.
(56) 85 L. J. (K. B.) 1596, 1606, 1608.
(57) (1888) 21 Q. B. D. 220.

well recognized that it is not enough to show that the plaintiff was well aware of the danger: there must also be evidence from which it can properly be inferred that he agreed to accept the risk. But it is said that the rule is different in a question between invitor and invitee. It is said, if I understand the argument rightly, that here it is not a question of a defence, but that when the invitor tells the invitee of the danger he thereby relieves himself of any further duty or liability to the invitee, with the result that, whether the invitee consciously elects to run the risk or not, he is in fact confronted with the option of continuing to accept the invitor's invitation at his own risk or of going away. There may be a technical distinction, but if I am entitled to look at the substance of the matter I can see no substantial distinction.

It seems to me that all the reasons which have led courts for many years past to stress the difference between volens and sciens are equally valid here. The defence of volenti non fit injuria is of general application; it is not confined to cases between master and servant. That is clearly explained by Lord Halsbury, L.C., in *Smith* v. *Charles Baker & Sons* (58), and the limitations of that defence are founded on general considerations of good sense.

Lord Watson said in *Smith* v. *Charles Baker & Sons* (59), on the assumption that a workman appreciated his danger: " I am " unable to accede to the suggestion that the mere fact of his " continuing at his work, with such knowledge and appreciation, " will in every case necessarily imply his acceptance. Whether " it will have that effect or not depends, in my opinion, to a " considerable extent upon the nature of the risk, and the work- " man's connexion with it, as well as upon other considerations " which must vary according to the circumstances of each case ".

In *Bowater* v. *Rowley Regis Corporation* (60) Scott, L.J., said: " . . . a man cannot be said to be truly ' willing ' unless " he is in a position to choose freely, and freedom of choice pre- " dicates, not only full knowledge of the circumstances on which " the exercise of choice is conditioned, so that he may be able " to choose wisely, but the absence from his mind of any feeling " of constraint so that nothing shall interfere with the freedom of " his will ".

Such considerations are almost as much applicable in a case like the present as they are in a case of master and servant: it may be just as difficult for a sub-contractor's servant to leave his work because he fears danger as it is for a servant of the main contractor who is in occupation of the premises. I do not think that it is certain or even probable that every invitee who is sciens is in fact also volens, so any rule of law that an invitee who is sciens must be deemed to have accepted the risk of which he was aware can only be founded on a fiction. I would not be prepared to assent to the introduction of a further fiction into the law in any case where that could be avoided.

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(58) [1891] A. C. 325.
(59) Ibid. 355.
(60) [1944] K. B. 476, 479.

Of course, if all these considerations are irrelevant, if your Lordships are forced by some overriding principle or by binding authority to disregard them, then there is no more to be said. But if this is really an open question then such considerations do not appear to me to be irrelevant. If they were relevant when one branch of the law was being developed they are, I think, equally relevant now.

In my judgment the duty of an invitor is not merely to take care that his invitee knows of unusual dangers; it is that so long as he holds out his invitation he shall take reasonable care for the safety of his invitee unless the invitee has relieved him of that duty by accepting the risk.

The only question which remains is whether it can be held in this case that the respondent did in fact accept the risk and relieve the appellants of their duty towards him. I do not doubt that an invitee can, if he chooses, accept the risk of injury to himself from a danger known to him, and if he does accept that risk he cannot thereafter hold the invitor liable for any injury which may result to him from that danger: in effect his acceptance of the risk brings to an end the invitor's duty to him with regard to that danger. Further, I do not doubt that a man does not have to state expressly that he accepts a risk; his acceptance can be inferred from the whole facts of the case.

But I do not think that it can be held in this case that as a matter of fact the respondent did accept the risk of injury to himself from the dangerously inadequate staging. I understood counsel for the appellants to state expressly that he did not put forward that case: his case was that as a matter of law, no matter what the circumstances may be, an invitee who continues to accept an invitation in knowledge of the danger involved cannot be heard to say that he has not accepted the risk, and I have already said why I do not agree with that. I do not think that on the pleadings counsel could properly have done otherwise. There is nothing in the appellants' pleadings to raise this issue.

The appellants merely deny negligence on their part and allege negligence on the part of the respondent, and that is all. It is true that Lynskey, J., said in this case (61): " If it were necessary to decide it, I should have held on the facts of this case " that the plaintiff did freely and voluntarily impliedly agree to " accept the risk of working on the staging with full knowledge " of the nature and the extent of the risk he ran ". I do not know what virtue there is in the word " impliedly ". If the judge merely means that acceptance of the risk must be inferred from the respondent's having continued to work in knowledge of the danger, then for the reasons which I have given I do not agree with that. But if he means that the whole facts of the case are sufficient to prove acceptance of the risk by the respondent, I do not think that he was entitled to make such a finding, and I do not think that it is open to your Lordships to make such a finding now. We do not know what the evidence would have been if the issue had been properly raised. If there is in this matter a difference between sciens and volens, and if it is not enough to prove knowledge, then the burden of proving facts to show that the plaintiff was volens as well as sciens must lie on the defendant and it cannot in my judgment be held that that burden has been discharged in this case.

To return to the main question: this case will decide whether an invitor's duty is determined by a rule, which seems to me to have no foundation in principle, that he can, while continuing to hold out an invitation, always relieve himself of his duty to take care by giving notice. I do not deny that fixed rules have advantages: cases can be more readily decided, and people interested can perhaps forecast more accurately what the decision will be in any case. But in the realm of negligence, at least, rigid rules give rise to what I believe to be avoidable injustice. I see no reason to depart unnecessarily from the simple method of asking in any case what would a reasonable man in the shoes of the defendant have done. That test is subject to obvious limitations. In some cases it is impracticable, and in many cases it is for one reason or another undesirable, to make that which a reasonable man would do a legal obligation, but I see no such difficulty in this case. In this case I have no doubt that a reasonable man in the position of the appellants would have averted the danger which caused damage to the respondent by providing more adequate staging. Why then was it not the appellants' duty to do

(61) [1949] 2 K. B. 584, 590.

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this? I have come to the conclusion that to hold that there was such a duty would infringe no principle and would conflict with no binding or well-recognized authority. I am therefore of opinion that this appeal should be dismissed.

Appeal allowed.

Solicitors: *Carpenters; Shaen, Roscoe & Co.*

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July 23.

BENNETT & WHITE (CALGARY) LD. . APPELLANTS;

AND

MUNICIPAL DISTRICT OF SUGAR CITY No. 5 . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Alberta—Revenue—Personal property tax—Plant and equipment used in Government construction contract—Assessment—Crown "the owner" of the plant—Assessee "in legal possession"—Appeal provisions—Res judicata—Exempt items included in non-itemized assessment—Assessment invalid in toto—The Assessment Act (*Alberta*), *R. S. A.* 1942, *c.* 157 (*as amended to* 1945), *ss.* 4; 5 (*o*) (*z*); 26, *sub-s.* 1 (*l*); 35; 47—*The Municipal District Act* (*Alberta*), *R. S. A.* 1942, *c.* 151 (*as amended to* 1948), *s.* 288—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 125.

The Dominion Government, which was carrying out in Alberta in 1946 an irrigation scheme involving the construction of diversion and irrigation tunnels in the respondents' municipal district, entered into a contract with the appellant company for the construction of those tunnels. The contract, under which the appellants were required to provide the plant and equipment necessary for carrying out the work, provided in cl. 15 that: "all machinery, tools, plant, "materials, equipment, articles and things whatsoever, provided "by the contractor . . . for the works . . . shall from the time "of their being so provided become and until the final completion "of the said work shall be the property of His Majesty for the "purposes of the said works . . .". The appellants having provided at the site of the works a large variety of plant and equipment, including a number of motor vehicles, which remained there during the year 1947, the respondent municipality, in purported exercise of their powers under the Assessment Act, R. S. A. 1942, c. 157, made an assessment on the appellants in respect of personal property in their district—the plant and equipment—for the year 1947. On complaint by the appellants against the assessment to the council of the respondents sitting as a Court of Revision, as provided by s. 35 of the Assessment Act, the assessment was slightly increased. The appellants, by virtue of s. 47 of the Act, then appealed against that decision to the Alberta Assessment Commission on the grounds, inter alia, first, that the personal property, the subject of the assessment, was the property of His Majesty (which property is exempted from taxation by s. 5 (*o*) of the Assessment Act and s. 125 of the British North America Act, 1867), and, therefore, they could not be assessed with regard thereto, and secondly, that the assessment contained a considerable number of motor vehicles, which were exempt from taxation by s. 5 (*z*) of the Assessment Act. The Commission were of opinion that the property in question had been rightfully assessed, but they reduced the assessment. Thereafter, the respondents, pursuant to their powers under the Municipal District Act, R. S. A. 1942, c. 151, having demanded a sum as tax in respect of the assessment, the appellants instituted the present proceedings alleging that they had been wrongfully and illegally assessed.

**Present:* Lord Simonds, Lord Normand, Lord Reid, Lord Radcliffe and Lord Asquith of Bishopstone.

Held, first, that the decision of the Alberta Assessment Commission was not res judicata so as to preclude the appellants from maintaining this action. The effect of the under-named authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment (which was not the case here under the relevant provincial legislation), and that the fact that the statute which authorizes the assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right: *Toronto Ry. Co.* v. *Toronto Corporation* [1904] A. C. 809; *Victoria City* v. *Bishop of Vancouver Island* [1921] 2 A. C. 384; *Donohue* v. *St. Etienne de la Malbaie* [1924] S. C. R. (Can.) 511; *Sifton* v. *City of Toronto* [1929] S. C. R. (Can.) 484; *City of Ottawa* v. *Wilson* [1933] O. R. 21, and *Hagersville Village* v. *Hambleton* (1927) 61 O. R. 327 disapproved.

Held, secondly, that the Crown was at all material times the "owner" of the plant, equipment and materials in question within the meaning of s. 26, sub-s. 1 (*l*), of the Assessment Act, which provided that the assessment roll should contain "the name "of the person who is the owner or of the person who is in legal "possession of assessable personal property . . .". The true position was, however, that while the delivery of the articles on the Crown site was a delivery to the Crown and vested the ownership of them in the Crown, there was a notional or actual bailment or redelivery of possession to the appellants for the purpose of carrying out the contract, and that accordingly, in the absence of other considerations, the appellants might have been validly assessed

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as persons "in legal possession" of the articles within the meaning of s. 26, sub-s. 1 (*l*), of the Assessment Act.

Held, further, however, that inasmuch as the assessment consisted of a single undivided sum in respect of the totality of property treated as assessable, the wrongful inclusion in it of the motor vehicles, which by s. 5 (*z*) of the Assessment Act were expressly exempted from taxation, rendered the assessment invalid in toto.

Montreal Light, Heat & Power Consolidated v. *City of Westmount* [1926] S. C. R. (Can.) 515 approved and applied.

Held, lastly, that even if motor vehicles had not been included in the assessment it would still, on the facts and under the relevant legislative provisions in this case, have been invalid. There was no express provision that the subject was to be liable to any extent in respect of Crown property, or that the exemption accorded to such property should not extend to the subject who might have some interest therein.

Smith v. *Vermillion Hills Rural Council* [1916] 2 A. C. 569, and *City of Montreal* v. *Attorney-General for Canada* [1923] A. C. 136, distinguished.

Judgment of the Supreme Court of Canada [1950] S. C. R. (Can.) 450, reversed.

APPEAL (No. 42 of 1950), by special leave, from a judgment of the Supreme Court of Canada (March 30, 1950), which reversed a judgment of the Appellate Division of the Supreme Court of Alberta (June 24, 1949), which in turn had affirmed a judgment of the Trial Division of that Court (Shepherd, J.) (April 21, 1949).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee:—The appellants were a company incorporated under the Companies Act of the Province of Alberta, and the respondents were a municipal district in that Province. By the judgment of the Supreme Court of Alberta it was declared that the assessment of the appellants for personal property made by the respondents for the year 1947 was invalid, and that assessment was quashed and set aside.

In 1946 the Dominion Government were carrying out in the southern part of the Province of Alberta a large irrigation scheme, which included the construction of diversion and irrigation tunnels at St. Mary Dam in the respondents' municipal district. On July 22, 1946, the Minister of Agriculture for the Dominion, acting on behalf of the Crown, entered into a contract with the appellants for the construction of those tunnels. That contract is hereafter referred to as "the contract". The value of the work to be done by the appellants under the contract was in the region of $800,000, and the work was to be completed by April, 1948. The contract provided that the appellants were bound to

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provide the plant and equipment necessary for carrying out the contract, and they did provide, at the site of the works, a large variety of plant and equipment which remained there during the year 1947.

The respondents were authorized by the Assessment Act and the Municipal District Act of the Province to make assessments and levy taxes in respect of personal property in their district, and in June, 1947, their assessor visited the site of the appellants' works and spent three days in making a detailed valuation of those parts of the plant and equipment brought there by the appellants which he thought were taxable under those Acts as personal property. The assessor's valuation of that property was $183,147. On September 22, 1947, the respondents sent to the appellants an assessment slip which was a notice that the appellants were assessed for the year 1947 in respect of $6,140 for buildings and improvements, and $177,007 for personal property, making in all the sum of $183,147. It was admitted by both parties that nothing turned in this case on the distinction between buildings and personal property, and that the assessment could be regarded as if it were entirely an assessment in respect of personal property. The appellants lodged a complaint against that assessment, and that complaint was dealt with by the council of the respondents' district sitting as a Court of Revision on October 31. The Court of Revision increased the assessment by $1,000. The appellants then appealed against that decision to the Alberta Assessment Commission on the following, among other, grounds:—"1. The personal property which comprises "$178,022 of the said assessment is the property of His Majesty "in the right of the Dominion of Canada and therefore the appel-"lants cannot be assessed with regard thereto. 2. The said "assessment contains a considerable number of motor vehicles "which are exempt from taxation".

That appeal was heard by the Commission and, after written briefs had been submitted, the Commission, on January 13, 1948, gave their decision, in which it was stated:—"After due con-"sideration of these briefs and the evidence submitted, the "Commission is of the opinion that the property in question has "been rightfully assessed to Bennett & White (Calgary) Ld. "The Commission, however, feels that the assessments are "excessive and should be reduced to amounts as follows:—

"Personal property	$119,980
"Buildings and Improvements	$4,470

"and it is so ordered".

The respondents then demanded from the appellants a sum of $3,915.27 as tax and penalty in respect of the assessment as altered by the Alberta Assessment Commission, and in answer to that demand the appellants raised the present action against the respondents on April 15, 1948.

To understand the nature of the present action it is necessary to have in mind the scheme for the taxation of personal property contained in the Assessment Act and the Municipal District Act (which were directed by s. 3 of the Assessment Act to be read together), and it is also necessary to have in mind certain provisions of the contract. As regards assessment, s. 4 of the Assessment Act provided that, subject to certain exceptions which were not material in this case—" All property and " every interest therein in a municipality which is subject or " liable to taxation by an Act of the Province, save and except " only such property as is declared by this Act to be exempt, " shall be liable to assessment and taxation by the municipality ".

The exemptions were contained in s. 5, and those material in this case were: " (*o*) every right, title and interest of His " Majesty in any property whatsoever "; and " (*z*) all motor " vehicles ".

Section 8 provided: " (2.) The Board of a school district " which collects its own taxes, and the council of any munici- " pality, may provide by by-law passed not later than the first " day of May in any year, that in the said year all personal " property within the school district or municipality, as the case " may be, shall be liable to assessment and taxation. In a " municipality this assessment may be made for municipal pur- " poses or for school purposes or for both.

" (3.) In any school district or municipality in which personal " property is liable to assessment and taxation, it shall be " assessed at its actual cash value as it would be appraised if " taken in payment of a just debt ".

The respondents passed a by-law on April 3, 1947, to the effect that " under authority of s. 8 of the Assessment Act, being " chapter 157 of the Revised Statutes of Alberta, 1942, and " subject to the various provisions of the said Act, the Council of " the Municipal District of Sugar City No. 5 enacts that within " the boundaries of Sugar City No. 5 all personal property shall " be liable to assessment and taxation for both municipal and " school purposes ".

Section 24 provided that the assessor of the municipality should make a return to the secretary-treasurer of the assessments made by him, and s. 26 directed the secretary-treasurer immediately to prepare an assessment roll in which he should set forth as far as his then information permitted " (*l*) the name " of the person who is the owner or of the person who is in legal " possession of assessable personal property or the names of both " such persons; (*m*) the assessed value of all assessable personal " property ".

Section 26, sub-s. 3, further provided that the secretary-treasurer should include in the assessment roll the name and address of every person who was assessed in respect of such property and particulars of the property assessed and the assessed value thereof, but s. 26, sub-s. 4, stated that failure to enter any of those particulars should not invalidate the assessment nor affect the liability of any person to pay taxes if the correct description and the assessed value of the property appeared on the assessment roll. Section 27 directed the secretary-treasurer to mail to every person whose name appeared on the roll an assessment slip.

If any person whose name appeared on an assessment roll wished to complain, s. 35 made provision for his complaint being made to the Court of Revision, and such complaint might be in respect of, inter alia, " (*b*) any assessment alleged to be too high " or too low; (*c*) any property or business in any way wrongfully " assessed; (*d*) the name of any person alleged to be wrongfully " entered upon or omitted from the assessment roll ".

A further appeal from a decision of the Court of Revision was provided by s. 47, which enacted: " (1) Any person who, or the " assessment of whose property is affected by the decision of the " Court of Revision, or of the person or persons from time to time " designated by the Minister as the person or persons to deal " with complaints may appeal to the Alberta Assessment Com- " mission against the decision and may also appeal against the " omission, neglect or refusal of the court to hear or decide a " complaint made to it, and in hearing all such appeals the " Commission shall be governed by the provisions of this Act and " the Alberta Municipal Assessment Commission Act ".

The Municipal District Act made provision in Part VII for the levying of taxes. Section 288 authorized a levy for ordinary municipal purposes on the assessed value of all lands, improvements and personal property set out in the assessment roll of a tax at a certain rate, and s. 291 directed the secretary-treasurer to enter in the assessment and tax roll a statement of all taxes against each parcel or personal property assessed on the roll. Section 295 directed the secretary-treasurer to mail to each person whose name appeared on the assessment roll notice of the amount of taxes due by him in respect of the property or business for which he was assessed, and s. 297 provided that all taxes levied under the provisions of that Act, except as otherwise provided, should be deemed to be due on the first day of January in the year in which they were imposed and should be payable at the office of the secretary-treasurer.

The provision in the contract on which the appellants chiefly relied in contending that the property assessed was the property of His Majesty was cl. 15, which was in these terms: "All "machinery, tools, plant, materials, equipment, articles and "things whatsoever, provided by the contractor or by the engineer "under the provisions of ss. 14 and 16, for the works, and not "rejected under the provisions of s. 14, shall from the time of "their being so provided become, and, until the final completion "of the said work, shall be the property of His Majesty for the "purpose of the said works, and the same shall on no account be "taken away or used or disposed of except for the purposes of "the said works without the consent in writing of the engineer. "His Majesty shall not, however, be answerable for any loss or "damage whatsoever which may at any time happen to such "machinery, tools, plant, materials, equipment, articles or "things. Upon the completion of the works and upon payment "by the contractor of all such moneys, loss, costs and damages, "if any, as shall be due from the contractor to His Majesty, or "chargeable against the contractor under this contract, such of "the said machinery, tools, plant, materials, equipment, articles "and things as shall not have been used and converted in the "works or disposed of by His Majesty under powers conferred in "this contract, shall upon demand be delivered up to the con-"tractor in such condition as they may then be in".

Relying on that clause, the appellants, in their statement of claim, contended that they had been wrongfully and illegally assessed because the personal property in respect of which the assessment was made was at all relevant times the property of His Majesty and that they could not be in law assessed or placed on the tax roll in relation thereto. Alternatively, the appellants relied on the exception of motor vehicles in s. 5 (*z*) of the

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Assessment Act, and contended that certain types of vehicles specified were motor vehicles within the meaning of that exception and were exempt from taxation.

The respondents in their defence and counterclaim contended that the decision of the Alberta Assessment Commission against the appellants was a final decision and that the appellants were precluded by it from taking exception to the assessment and taxation of which they complained. The respondents further sought a declaration that the appellants were liable to the said assessment and taxation.

Shepherd, J., decided that the appellants were not precluded from maintaining this action and that they were entitled to succeed on the ground that the assessment for personal property made against them for the year 1947 was invalid. He therefore quashed and set aside that assessment. The Appellate Division of the Supreme Court of Alberta reached the same decision but on somewhat different grounds. The case was then appealed to the Supreme Court of Canada, where the decision of the courts of Alberta was reversed and the appellants' action was dismissed. The decision of the Supreme Court of Canada was unanimous, but judgments of Kerwin and Rand, JJ., were based on different reasons. The decision of Rand, J., was concurred in by Taschereau, Estey and Locke, JJ. Rand, J., held that the appellants were not precluded by the decision of the Alberta Assessment Commission from maintaining this action, but that they failed in this action because the property assessed was not the property of His Majesty but was throughout owned and possessed by the appellants. The majority, however, held that certain of the subjects assessed came within the statutory exception of motor vehicles. Kerwin, J., was of opinion that the appellants were precluded from maintaining this action on the ground that the decision of the Alberta Assessment Commission was res judicata.

1951. May 22, 23, 24, 28 and 29. *R. H. Barron* (of the Canadian Bar) for the appellants. The first point is that the contract expressly provides that the property under assessment is the property of the Crown, and it is submitted, therefore, that as such it is exempt from taxation both by virtue of s. 125 of the British North America Act, 1867, and of s. 5 (*o*) of the Alberta Assessment Act. The respondents, however, say that, properly interpreted, the contract does not vest the property in the Crown and that therefore it was not exempt from taxation. Secondly, the immediate dispute arises over the proper interpretation of the governing legislation—the Assessment Act and the Municipal District Act. The appellants contend that those Acts do not impose taxation on any person, but, on the contrary, that they authorize taxation only on the property itself; that whether the property is vested in the Crown or not, the liability cannot be imposed on the appellants personally. The respondents contend that the legislation imposes taxes on persons in respect of property, and that therefore taxation can be validly imposed on the appellants in respect of the property regardless of whether the property is vested in the Crown or not. Thirdly, the respondents contend that in any event the appellants retained some interest of a limited nature in the property, and that the appellants can be validly taxed in respect of that interest. In reply to that, the appellants say that no interest of a taxable nature was retained by them, and, further, that taxation of limited interests, or of persons in respect of limited interests in personal property, is not authorized by the legislation. They also say that in any event no attempt was ever made to tax them in respect of a limited interest in the property, but that, on the contrary, the property itself was taxed without regard to any limited interest.

The fourth matter in dispute concerns the machinery for the collection of personal property taxes. The respondents in their counterclaim sue for personal judgment against the appellants for the amount of the taxes. They also claim that they are entitled to seize and sell any of the goods and chattels of the appellants wherever found within the Province of Alberta, not just the chattels under taxation: it is conceded that the property under assessment cannot be seized so long as it is subject to the contract with the Crown. The appellants dispute both the right to sue for judgment for the taxes and the right to seize their goods and chattels. They contend that these taxes, if otherwise validly imposed, may only be collected out of the very property under assessment, and that inasmuch as that property was totally incapable in law of being seized and sold the taxation was not effective. The appellants further say that in any event a substantial portion of the property under assessment consisted of motor vehicles, which are expressly exempted from taxation, and they contend that as the assessment was not itemized so as to distinguish between exempt and non-exempt property no taxation may be levied. The respondents, however, submit that none of the property in question consists of motor vehicles, and in any event they say that the taxation can in some manner be apportioned between exempt and non-exempt property.

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The final dispute concerns whether or not the appellants are precluded from raising any issue regarding the validity of the taxation by reason of the decision of the Alberta Assessment Commission. The appellants contend that the authorities establish that the legislation should be interpreted as conferring power on the Commission to deal with mere questions of irregularities, errors and omissions, and that it does not empower the Commission to say that non-taxable property may be taxed. The appellants further contend that in any event the Commission's decision relates solely to matters of assessment and has no application to the levy of taxes; and what is substantially in issue in this action is a purported levy of taxes, not an assessment, and the decision of the Commission, in the submission of the appellants, has no operation.

With regard to the first point—the effect of cl. 15 of the contract—the argument of the respondents that the property was not vested in the Crown is fallacious, because the Crown had a definite need to have the title to the property vested in itself long before any question of default could arise. The Crown was vitally interested in ensuring that proper plant and equipment should be available at all times, and that was accomplished by means of this clause, which in simple plain language does purport to vest this property in His Majesty. The words are not ambiguous. Both law and equity follow the same rule, and refuse to regard a successor of personal property as having any present right or estate in that property: *In re Thynne, Thynne* v. *Grey* (1); Halsbury's Laws of England (2nd ed.), vol. 25, p. 224. The authorities, apart from *In re Keen & Keen, Ex parte Collins* (2), establish that the true effect of words such as those in cl. 15 is: " I vest in you the property both in law and in equity, to be used " by me or another on your behalf for the purpose of completing " the work subject to my contractual right to have the property " revested in me ". The object of cl. 15 was the protection of the Crown, and that object fails completely under the interpretation of Rand, J., in the Supreme Court. English cases on vesting clauses are *Brown* v. *Bateman* (3); *Blake* v. *Izard* (4); *Reeves* v. *Barlow* (5), a leading authority, which shows that there is nothing left in the contractor on which any legal right can attach; *Keen's* case (2), in which it was said there was " an

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(1) [1911] 1 Ch. 282, 285.
(2) [1902] 1 K. B. 555, 560.
(3) (1867) L. R. 2 C. P. 272, 281.
(4) (1867) 16 W. R. 108.
(5) (1884) 12 Q. B. D. 436.

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"ambiguous possession"; that case appears never to have been relied on in any subsequent case; it is discussed in Halsbury's Laws of England (2nd ed.), vol. 3, p. 301, and in Hudson on Building Contracts (7th ed.), at pp. 396 and 420—they considered it to be a case strictly on its own facts, which deal with that ambiguous possession; *In re Weibking, Ex parte Ward* (6), where it was decided that there was a vesting; *Hart* v. *Porthgain Harbour Co. Ld.* (7), in which are found the ambiguous words "shall "be considered", but despite that Farwell, J., did not apply the principle of *Keen's* case (2), but that of *Reeves* v. *Barlow* (5); and the most recent case, *Metropolitan Water Board* v. *Dick, Kerr & Co.* (8). *Beeston* v. *Marriott* (9) was not mentioned in any of the above cases. In *Brown* v. *Bateman* (3) the Crown had the equitable title to the property, and in *Reeves* v. *Barlow* (5) it had the legal title.

The property in the present case was not assessable by virtue of s. 125 of the British North America Act, 1867, which provides that "no lands or property belonging to Canada or any Province "shall be liable to taxation". The words "belonging to" were considered by Hudson, J., in *City of Vancouver* v. *Attorney-General for Canada* (10). In *City of Halifax* v. *Fairbanks' Estate* (11) there was an express direction by the legislature authorizing in special circumstances persons to be taxed in respect of exempt property; there is no such direction in the present case.

Turning to the second point—the consideration of the Assessment and the Municipal District Acts—it is submitted that that legislation authorizes taxes only on the property as such, and that nowhere does it authorize the tax on any person in respect of that property: the Municipal District Act, ss. 288, 289, 291, 293, 295, 297 and 298. The charge on the subject must be imposed strictly. It is contended also that there is no machinery in the Act for the taxation of limited interests. Further, there is no machinery in the legislation for the enforcement of the payment of personal property taxes.

Section 5 (*o*) of the Assessment Act provides that "every "right, title and interest of His Majesty in any property what-"soever" is exempt from taxation. Any interest which the appellants have in this case is in the nature of a chose in action, and, if that be so, it is clearly exempt under s. 5 (*r*) of the

(3) L. R. 2 C. P. 272.
(5) 12 Q. B. D. 436
(6) [1902] 1 K. B. 713, 718.
(7) [1903] 1 Ch. 690, 694.
(8) [1917] 2 K. B. 2, 13.
(9) (1864) 4 Giff. 436.
(10) [1944] S. C. R. (Can.) 23, 46.
(11) [1928] A. C. 117, 120, 122.

Assessment Act, which expressly provides for the exemption of "money, bank notes, cheques, bills of exchange, promissory notes "and choses in action". It would appear to be exempt in any event, because the definition of "personal property" in s. 2 (*q*) of the Act is "all goods and chattels", and a chose in action could not be goods and chattels. Also, whatever view is taken of the words of s. 26 of the Act, it is not a charging section in any true sense of the term: *Attorney-General for Canada* v. *City of Vancouver* (12). The test of what is a charging section is in *Oriental Bank Corporation* v. *Wright* (13). There cannot be a direction that there should be a general levy against the goods and chattels of the appellants.

Assuming, contrary to the appellants' contention, that this is assessable property, and that s. 26 of the Assessment Act is a charging section, then either the "owner" or the "person who is in legal possession" is to be assessed. It has been submitted that the Crown is the "owner". With regard to "legal possession", that means possession enforceable in law as against the world, and in the circumstances of the present case the appellants did not have such legal possession. They were mere licensees with a right to use the property, and then only in express terms subject to the contract; it could not be said that there was legal possession: *In re Keen & Keen* (13a). At best the possession of the appellants was an ambiguous possession. Further, if there should be any doubt about the possession, the property being on Crown land it would in law be attached to the title, and the title under cl. 15 of the agreement was in the Crown: *Ramsay* v. *Margrett* (14).

Assuming next that the appellants are wrong on the vesting point, it is submitted that the legislation does not authorize the taxation of limited interests in personal property. It is property or nothing which is being taxed: *City of Halifax* v. *Fairbanks' Estate* (15).

Lastly, a substantial portion of the items under assessment consisted of motor vehicles, which are exempt from taxation under s. 5 (*z*) of the Assessment Act, and that being so the entire assessment, since it was not itemized, must be quashed: *Montreal Light, Heat and Power Consolidated* v. *City of Westmount* (16), in which a similar situation arose.

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(12) [1943] 1 W. W. R. 196, 203.

(13) (1880) 5 App. Cas. 842, 856.

(13a) [1902] 1 K. B. 555.

(14) [1894] 2 Q. B. 18, 25.

(15) [1928] A. C. 117, 120.

(16) [1926] S. C. R. (Can.) 515, 522.

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A. G. Virtue, K.C. (of the Canadian Bar), and *J. G. Le Quesne* for the respondents. These two Acts—the Assessment and the Municipal District Acts—provide a general scheme for the assessment and taxation of personal property and of persons in respect of personal property. Every right, title and interest of His Majesty is exempted, but there is not exempted every property in which His Majesty has a right, title and interest. The assessment roll is the foundation of the whole assessment and taxation, and every person must be placed on the roll who has any interest at all. The scheme is that if someone is found to be the owner or in legal possession of personal property he shall be assessable. Section 26, sub-s. 4, of the Assessment Act expressly provides for the liability of the person for the taxes imposed in respect of personal property: see also s. 27; and in s. 29 there is a reference to " enter the name of any such person " upon the roll ". Section 32 shows an intention in the legislature that interests shall be taxed. Section 33 provides that " where any person was at the time of the assessment taxable in " respect of any property . . .". The legislature had in mind the assessment of property and then the taxation of persons in respect of that property, whether it was real or personal property. In both the Acts—the Assessment Act and the Municipal District Act—no distinction is made between the imposition of taxes on land and on personal property, that is, they are charged in exactly the same way. All through the Acts the person is liable for the tax in respect of the property.

Under the contract the appellant construction company had an interest in the plant and equipment and therefore it was assessable. The purpose and scope of the entire contract has to be ascertained. If the words of cl. 15 stood alone, the conclusion might have been reached that the intention was that the plant and equipment should become the property of the Crown; but this is a long contract with many provisions, and taking it as a whole, including the specifications, it is submitted that what is intended is that the Crown shall have certain contractual rights respecting this property, but that fact does not by any means indicate that the contractors ceased to have other interests themselves: whether equitable or legal does not matter. The Supreme Court went the whole way and said that the contractors were the owners. If the contractors have an interest in the chattels they are assessable and should be taxed.

It is not contended that this is a case of successive estates in personal property. Looking at the essence of the transaction, the real owner of the property still continued to be the appellants. It has to be ascertained which line of cases applies to this particular contract, the *In re Keen & Keen* class (17) or that represented by *Reeves* v. *Barlow* (18). On the construction of cl. 15 the interest in the Crown was only temporary; the remaining interest resides in the contractors. It was only because the ownership was reserved to them that they were told that there was a contractual obligation on them not to take the property away. The clause stating that "His Majesty shall not be "answerable for any loss", etc., is consistent only with an interest in the contractors; and the Supreme Court pointed out that "upon completion shall . . . be delivered up to the con-"tractor" is a surrender to the contractors of their own property. Other clauses in the contract clearly indicate that the contractors retained an interest; they continue to have some interest limited by the contractual rights of His Majesty. Many of the provisions of cl. 18 of the contract would seem to be unnecessary if these goods were already the property of the Crown; in other words, the position is the same as arose in the *Keen* case (19).

It is said in Hudson on Building Contracts (7th ed.), p. 398 (n.), that "the precise terms of building contracts are various, "but there is a general intention in the framing of all these "vesting clauses to prevent the execution creditor or trustee in "bankruptcy of the builder from claiming the materials. . . . "The result is that a kind of qualified ownership is often created, "leaving the builder an interest of some kind in the materials". Those words seem to fit this particular contract, and Hudson refers to *Beeston* v. *Marriott* (20), which has stood unchallenged for over eighty years and was cited in *Ilfracombe Railway Co.* v. *Lord Poltimore* (21). *Reid* v. *MacBeth & Gray* (22), an unusual case, is not on all fours with the present case. The clauses in this contract set it in the category of *Beeston's* case (20) and *Keen's* case (19) rather than in that of *Reeves* v. *Barlow* (23). *Reeves's* case (23) gives the clue to the reconciliation of those various decisions. At first glance there appears to be a contradiction, but that disappears when the actual terms of the contracts are examined. In *Reeves's* case (23) much more definite conditions were attached than in the *Keen* case (19). If, as is

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(17) [1902] 1 K. B. 555.
(18) 12 Q. B. D. 436.
(19) [1902] 1 K. B. 555.
(20) 4 Giff. 436.
(21) (1868) 37 L. J. (C. P.) 86, 88.
(22) [1904] A. C. 223.
(23) 12 Q. B. D. 436.

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submitted, the present contract falls into the *Keen* class (19), and not that of *Reeves* (23), it follows that the contractors had certain rights of ownership under the contract in respect of which they were assessable under the Act. The words used in this contract are not terms of art, but those used by practical business men.

The various cases relied on before this Board and in the courts below show the distinction between the two lines of cases: *Metropolitan Water Board* v. *Dick, Kerr & Co.* (24), which supports the respondents here; *Hart* v. *Porthgain Harbour Co. Ld.* (25). [Reference was also made to *Luxor (Eastbourne) Ld.* v. *Cooper* (26).]

Section 26, sub-s. 1 (*l*), is in accordance with the whole scheme of assessment. The words "legal possession" are not to be treated as a term of art. "Legal possession" is simply "actual "or lawful possession" as opposed to unlawful possession. The evidence here shows that the actual physical possession never left the contractors. [Reference was made to *John Laing & Son Ld.* v. *Kingswood Assessment Committee* (27) and to *Smelting Company of Australia* v. *Inland Revenue Commissioners* (28), in the latter of which it was said: "It has often been said by judges of "very great experience that, in construing Acts relating to the "revenue, the popular sense of the words rather than their strict "legal meaning should be looked at".] That statement should be applied here, and "legal possession" in s. 26 should be given a popular, rather than a strict legal, meaning. Further, it is submitted that certain admissions as to possession were made by the construction company in the course of these proceedings.

With regard to the motor vehicles, this question is now in issue here because this is an appeal from both the minority and majority judgment of the Supreme Court, and that is why no cross-appeal was brought. As to the appellants' contention that the whole assessment was rendered invalid by the inclusion of the motor vehicles because it was not possible to say what was itemized, *Montreal Light, Heat and Power Consolidated* v. *City of Westmount* (29) involved an entirely different situation from that which exists in the present case. If under s. 53 of the Assessment Act an administrative body such as the Alberta Assessment Commission cannot decide the question whether they were motor vehicles or not, what question is there that they could decide? With that decision before them it was not open to the Supreme Court to consider the question whether the "dumptors" were motor vehicles or not, and if that be right, the question raised in the *Montreal Light, Heat and Power* case (29) does not arise.

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(19) [1902] 1 K. B. 555.
(23) 12 Q. B. D. 436.
(24) [1917] 2 K. B. 2, 13.
(25) [1903] 1 Ch. 690, 694.
(26) [1941] A. C. 108, 130.
(27) [1949] 1 K. B. 344.
(28) [1896] 2 Q. B. 179, 184.
(29) [1926] S. C. R. (Can.) 515, 522.

Section 310, sub-s. 4, of the Municipal District Act enables the respondents to recover these taxes without in any way interfering with any property in which His Majesty has any contractual rights. All that the respondents had to do was to find other goods of the contractors in the Province and distrain on them.

It was next objected that the interest of the Crown exempted from taxation has nevertheless been included in the property taxed. Assuming that the Crown had some interest in this property, perhaps the legal estate, perhaps some contractual right or obligation in addition, nevertheless, if the contractors still retained some interest, that interest is taxable even though the Crown may have an interest in the property: *City of Vancouver* v. *Attorney-General for Canada* (30); *City of Halifax* v. *Fairbanks' Estate* (31); *Southern Alberta Land Co.* v. *Rural Municipality of McLean* (32). The principles laid down in those cases apply to the case at bar. [Reference was also made to *Smith* v. *Rural Municipality of Vermillion Hills* (33), *Rural Municipality of Spy Hill* v. *Bradshaw* (34), and *City of Montreal* v. *Attorney-General for Canada* (35).] There is here no plea anywhere that the assessment was void because His Majesty had an interest in the property.

Taxation on a limited interest may be calculated on the entire value of the property although including the Crown's interest: *City of Vancouver* v. *Attorney-General for Canada* (36). In *Barnwell Consolidated School District No. 15* v. *Canadian Western Natural Gas, Light, Heat and Power Co. Ld.* (37) there was a special legislative provision that only the interest should be taxed.

There is a further point as to res judicata. It was not open to the appellants in this action to attack the jurisdiction of the Alberta Assessment Commission, whose decision, it is submitted, was res judicata. That question was not raised in their pleading; on the contrary, para. 6 of the statement of claim states that

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(29) [1926] S. C. R. (Can.) 115.
(30) [1944] S. C. R. (Can.) 23, 31.
(31) [1928] A. C. 117, 122.
(32) (1916) 53 S. C. R. (Can.) 151, 160.
(33) (1914) 49 S. C. R. (Can.) 563, 574; [1916] 2 A. C. 569, 573.
(34) [1912] 2 W. W. R. 399.
(35) [1923] A. C. 136, 137–8, 140.
(36) [1944] S. C. R. (Can.) 23, 58.
(37) [1922] 3 W. W. R. 300.

" the Assessment Act . . . relates to and governs the liability to " assessment and taxation . . .". If the appellants had intended to raise the question of the jurisdiction of the Assessment Commission to deal with the matter they should have so pleaded: *Toronto Corporation* v. *York Corporation* (38). They say that because the property was exempt the Assessment Commission had no authority at all to deal with this question. Where, however, the answer to the defence of res judicata was that there was a lack of jurisdiction in the court, that should have been pleaded: The Annual Practice, 1950, vol. 1, p. 358; Bullen & Leake (10th ed.), p. 766; Halsbury's Laws of England (2nd ed.), vol. 25, paras. 411, 412, 429. The respondents submitted on the pleadings that the jurisdiction of the Assessment Commission was not in question.

If it is open to the appellants to question the jurisdiction of the Commission, it is submitted that under s. 53 of the Assessment Act the Commission is expressly given power to hear and determine " all questions as to whether any things are or were " assessable or persons were properly entered on the assessment " roll or are or were legally assessed or exempted from assess- " ment ". It was said by Duff, J., in *Township of Cornwall* v. *Ottawa and New York Railway Co.* (39), citing Bowen, L.J., in *Ex parte Pratt* (40), that " there is a quaint old-fashioned rule " that no one has a right so to conduct himself before a tribunal " as if he accepted its jurisdiction, and then afterwards, when " he finds that it has decided against him, to turn round and say, " ' you have no jurisdiction '. You ought not to lead a tribunal " to exercise jurisdiction wrongfully ". The common sense embodied in those words is applicable here. [Reference was also made to *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ld.* (41), *J. P. Bayly Ld.* v. *Attorney-General of Fiji* (42), *Village of Hagersville* v. *Hambleton* (43), *Foster* v. *Township of St. Joseph* (44) *and Toronto Railway Co.* v. *Toronto Corporation* (45).] The point in the last-cited case was that in view of the fact that the court of first instance had no jurisdiction to determine that case, therefore there was no jurisdiction throughout. But in the present case, and in the *Hagersville* case (43), the assessment bodies were given the very power which

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(38) [1938] A. C. 415, 417.
(39) (1916) 52 S. C. R. (Can.) 466, 499.
(40) 12 Q. B. D. 334.
(41) [1949] A. C. 134.
(42) [1950] 2 W. W. R. 769, 773.
(43) (1927) 61 O. R. 327.
(44) (1917) 39 O. L. R. 114, 117.
(45) [1904] A. C. 809.

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was lacking when the Judicial Committee decided the *Toronto Railway* case (45). "Where alternative constructions of a statute "are equally open, that alternative is to be chosen which will "be consistent with the smooth working of the system which the "statute purports to be regulating": *Shannon Realties Ld.* v. *Ville de St. Michel* (46).

There is therefore nothing new or strange in an administrative body having wide, what may be called judicial, powers in making an assessment. There would be no appeal to the courts unless it was given by statute, and that is not so here. The power to set up an assessment system has been so used as to deprive the ordinary courts from having jurisdiction. The Alberta Assessment Act would be rendered of no avail if a party could bring an action in the courts. Kerwin, J., in the Supreme Court, was right in giving effect to the obvious plain grammatical meaning of s. 53 in the absence of any evidence of its constitutional insufficiency and in holding that the decision of the Alberta Assessment Commission was res judicata. In *Donohue* v. *St. Etienne de la Malbaie* (47) the appeal provisions are totally different from those of s. 53 here, and therefore that case can be distinguished, as also can *Victoria City* v. *Bishop of Vancouver* (48) and *Sifton* v. *City of Toronto* (49). [Reference was also made to *City of Ottawa* v. *Wilson* (50).]

Some of the above-cited decisions may cut down the *Hagersville* decision (51) to some extent. If they do so, then reliance is placed on the principles laid down in the *Hagersville* case (51) which, it is submitted, are sound and cannot be questioned. Here the legislature has set out the power and jurisdiction; the appellants themselves invoked the decision both of the Court of Revision and of the Assessment Commission, and the fact that they did so to some extent distinguishes many of the cases relied on.

[Counsel was not required to deal with the question of the motor vehicles, but LORD SIMONDS said that the question still remained whether the judgment of the Supreme Court could be maintained.]

The question is whether the inclusion of the dumptors in the assessment renders the whole assessment void. If the appellants be right, and the Assessment Commission had no power to decide this question, then the proceedings both before the Commission and before the Court of Revision were a nullity, and in that event the matter was left as it stood when the assessment was made. As to the amount involved, it is 3.45 per cent., and the amount involved in the taxation of the dumptors is $621, and it is submitted that the maxim de minimis non curat lex is applicable. [Reference was made to *Rural Municipality of Spy Hill* v. *Bradshaw* (52).]

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(45) [1904] A. C. 809.
(46) [1924] A. C. 185, 192.
(47) [1924] S. C. R. (Can.) 511.
(48) [1921] 2 A. C. 384, 396.
(49) [1929] S. C. R. (Can.) 484, 488.
(50) [1933] O. R. 21, 26.
(51) 61 O. R. 327.

The onus is on the appellants to bring themselves within the exemption: *Anderson Logging Co.* v. *The King* (53). The exemption provisions of a taxing Act must be construed strictly: *W. G. Lumbers* v. *Minister of National Revenue* (54) and *City of Vancouver* v. *Attorney-General for Canada* (55).

Le Quesne followed. The Board has indicated that because the Supreme Court found that the dumptors were exempt from taxation it might be that that court should for that reason have found the whole assessment invalid and quashed it, and that because there is on the record no cross-appeal on that point it is not open now to allege that the decision of the Supreme Court in respect of the dumptors was wrong. If necessary, the respondents now ask to be given leave to enter a cross-appeal: Bentwich, Privy Council Practice (3rd ed.), pp. 173–4; *Toronto Railway Co.* v. *King* (56). The omission to enter a cross-appeal is nothing more than a matter of form.

[After *Barron*, for the appellants, had argued that leave to enter a cross-appeal should not be granted, Lord Simonds announced, after an interval for consideration, that their Lordships did not propose to allow a cross-appeal.]

Le Quesne, continuing, dealt with a number of authorities on the jurisdiction and res judicata points, and said that it would be difficult to imagine a section giving wider powers to the Assessment Commission than s. 53 of the Assessment Act.

Barron, in reply. It is not contended that s. 53 is ultra vires. When properly interpreted it is intra vires. In effect, however, the respondents are seeking to give to the section such a wide interpretation that it will necessarily involve conflict with the British North America Act, with the result that the section will necessarily be ultra vires. An Act should be so interpreted as to make it effectual and not a nullity: *Smith* v. *Vermillion Hills*

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(52) [1912] 2 W. W. R. 399.
(53) [1925] S. C. R. (Can.) 45.
(54) [1943] Ex. Ct. R. 202.
(55) [1944] S. C. R. (Can.) 23, 57.
(56) [1908] A. C. 260, 262.

Rural Council (57); *City of Vancouver* case (58); *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (59); *McLeod* v. *City of Windsor* (60). There is no doubt that an assessment of Crown property such as there is in the present case is not within the authority of a Province under s. 53. With regard to the relevant sections of the Assessment Act, it ought to be presumed that the legislature did not intend to give judicial powers to an administrative tribunal not supervised by the courts. The crux of s. 53 lies in the use of the words " assessable " and " assessed "; if the legislature meant " taxable " and " taxed " it should have said so; it has no application to matters of taxation: *Hiram Walker-Gooderham & Worts Ld.* v. *Windsor* (61). In the present case the appellants are essentially resisting a claim for taxes, and that is open to them even though the assessment roll still stands; it is a valuation roll and nothing else. Mere machinery sections dealing with valuation cannot be used to determine the validity of the tax. For the doctrine of res judicata to be applied in this case the words of s. 53 must first be stretched in two respects which cannot be justified, namely, first, to bring in the concept of taxation in place of assessment, and, secondly, it must be said that this administrative tribunal—the Alberta Assessment Commission—is exercising, and was intended to exercise, judicial powers. With regard to the motor vehicles, the doctrine of de minimis does not apply on the facts, and the assessment should be quashed in its entirety.

July 23. The judgment of their Lordships was delivered by LORD REID, who stated the facts and statutory provisions set out above and continued:—Their Lordships think it proper to deal with the question of res judicata first as it involves a question of jurisdiction.

Questions of a somewhat similar character have arisen not infrequently in the past and it may be well, before examining the statutory provisions which are relevant in this case, to consider the earlier cases. *Toronto Railway Co.* v. *Toronto Corporation* (62) has for long been regarded as the leading authority. In that case, under the Assessment Act of Ontario, personal property of the company was exempt from assessment and the question was whether the company's tramway cars in Toronto were within this

(57) [1916] 2 A. C. 569, 574.
(58) [1944] S. C. R. (Can.) 23, 32.
(59) [1933] A. C. 378, 385.
(60) [1923] S. C. R. (Can.) 696, 703.
(61) [1947] 4 D. L. R. 118, 203–5.
(62) [1904] A. C. 809.

exception or were liable to taxation as real estate. The corporation assessed these cars. The Assessment Act provided for an appeal to a Court of Revision which was empowered to "try "all complaints in regard to persons wrongfully placed upon or "omitted from the roll or assessed at too high or too low a sum". That court decided against the company on their appeal. The Act provided for further appeals, first to a board of county court judges and then to three or more judges of the Court of Appeal; and it provided that the latter appeal should be final. The company appealed unsuccessfully to the board and then to the Court of Appeal. Then the corporation sought to tax the company on the value of the tramway cars. The company refused to pay and raised an action in which they claimed a declaration that the cars were personal estate and that they were not liable to pay the tax in respect of them which the corporation demanded. The corporation pleaded, inter alia, that the decision of the Court of Appeal was res judicata. Their Lordships held that the Court of Revision and the courts exercising the statutory jurisdiction of appeal from it "had no jurisdiction to determine the question "whether the assessment commissioner had exceeded his powers "in assessing property which was not by law assessable. In "other words, where the assessment was ab initio a nullity they "had no jurisdiction to confirm it or give it validity" (63). Their Lordships pointed out that this decision was in accordance with earlier Canadian authorities.

In *City of Victoria* v. *Bishop of Vancouver Island* (64) the land on which St. Andrews Cathedral stands had been assessed for several years under the Municipal Act of British Columbia and the corporation sought to recover from the bishop taxes in respect of those years. The Act exempted every building set apart and in use for the public worship of God, and the question was whether the site of the cathedral fell within this exemption. The corporation contended that it was too late to raise this question. The Act provided that every person complaining of an "error or omission in regard to himself" as having been wrongfully placed on the assessment roll had a right of appeal to a Court of Revision, and that the assessment roll as revised, confirmed and passed by the Court of Revision, except in so far as amended on appeal by one of the tribunals mentioned in the Act, should be deemed valid and binding on all persons concerned. The bishop had taken no objection to the assessment rolls for the

(63) [1904] A. C. 809, 815.

(64) [1921] 2 A. C. 384.

years in question and they were duly passed and confirmed, but it was held by their Lordships that this did not prevent him from maintaining later that no taxes had been lawfully imposed on the land on the ground that the sections to which reference has been made " are merely machinery sections dealing with irregularities, " mistakes and errors occurring in the drawing up, shaping and " forming of the assessment rolls, and do not by any means " empower the corporation or its officers to assess and tax any " kind of property expressly or impliedly exempted from taxation " by the provisions of these very statutes from 1914 to 1918, " both inclusive. To hold that they did so would amount to " holding that the corporation and its officers had the power of " repealing express provisions of these statutes " (65).

These cases were followed by the Supreme Court of Canada in *Donohue* v. *St. Etienne de la Malbaie* (66). In that case Anglin, J., said: " The inclusion of the non-assessable property " is simply ineffectual. Such property, though included in the " roll, cannot be made the subject of taxation ". In *Donohue's* case (66) the Supreme Court, in their Lordships' judgment rightly distinguished *Shannon Realties* v. *Ville de St. Michel* (67). In the *Shannon* case (67) the company sought to have the entire assessment roll for several years quashed and annulled. This claim failed, but it appears from a passage in the judgment of Duff, J., which was approved by their Lordships, that it was open to the company to question the roll in answer to a claim for taxes.

The case on which the respondents in this appeal chiefly relied was *Village of Hagersville* v. *Hambleton* (68), in which the decision of a Court of Revision was held to be res judicata. The Ontario Assessment Act had been amended after the decision in *Toronto Railway Co.* v. *Toronto Corporation* (69) so as to give to the Court of Revision jurisdiction to determine the amount of any assessment and also all questions whether any persons were assessable or had been legally assessed, and Middleton, J.A., stated that the Act as amended " gives to the assessment roll, " as finally revised, a binding and conclusive effect as to all " matters that were or might have been raised on an appeal to " the Court of Revision ". Their Lordships are unable to agree with this as a general statement of the law. In the first place, the *Hagersville* case (68) was complicated by an admission that

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(65) [1921] 2 A. C. 384, 396.

(66) [1924] S. C. R. (Can.) 511, 516.

(67) [1924] A. C. 185.

(68) (1927) 61 O. R. 327, 330.

(69) [1904] A. C. 809.

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jurisdiction was legally and effectively vested in the Court of Revision, and it was held, at least by some of the learned judges, that it followed from this that a decision of the Court of Revision was res judicata. Riddell, J., having stated the general rule that in order to oust the jurisdiction of the ordinary courts it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other court, said: "Here "the plea has been properly made, the jurisdiction in the 'other "'court', the Court of Revision, is admitted, and the matter "must be held concluded". And secondly, their Lordships are unable to reconcile the statement of the law by Middleton, J.A., with later Ontario cases. In *Sifton* v. *City of Toronto* (70) an assessment was made on a person who had ceased to reside in Toronto. The assessment was made by simply taking the previous year's assessments. The person aggrieved had resided in Toronto during that year and had then no reason to appeal. The next year he had no opportunity to appeal in the manner provided by the Act because of the procedure adopted in making the assessment: the only possible appeal was to the court. That being so, the Supreme Court distinguished the *Hagersville* case (68), and held that appeal to the court was competent. Their Lordships recognize that this is a possible distinction, but they are unable to find any sufficient distinction between the *Hagersville* case (68) and the next case decided in Ontario, *City of Ottawa* v. *Wilson* (71). In that case the taxpayer had removed from the city before he was assessed, so the City had no right to assess him. He could have exercised the rights of appeal under the Assessment Act, but he did not do so. Instead, he raised the matter in court, and he was held entitled to do so. The only substantial difference between this case and the *Hagersville* case (68) appears to be that in the *Hagersville* case (68) the person aggrieved had appealed unsuccessfully to the Court of Revision before raising the matter in the ordinary courts, whereas in *Wilson's* case (71) he had not. This could only be a valid distinction if the law were that a person aggrieved by an assessment has an option either to appeal in the manner provided by the Act or to raise the matter in the ordinary courts. Their Lordships have seen nothing in the Act from which an intention to create such an unusual option could be inferred.

In their Lordships' judgment the effect of these authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

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(68) (1927) 61 O. R. 327, 330.

(70) [1929] S. C. R. (Can.) 484.

(71) [1933] O. R. 21.

As has already been stated, a person who objects to an assessment under the Assessment Act of the Province of Alberta is entitled under that Act to complain to a Court of Revision on any of the grounds set out in s. 35: those grounds include a complaint that any property has been wrongfully assessed or that the name of any person has been wrongfully entered on the assessment roll. If dissatisfied with the decision of that court he can, under s. 47, appeal against that decision to the Alberta Assessment Commission. So there are three stages at which a person might plead in an action in the ordinary courts that he had been illegally assessed and was not bound to pay tax levied in consequence of that assessment. He might do so without having exercised his right to complain to the Court of Revision; or he might do so after having complained unsuccessfully to the Court of Revision but without having exercised his right to appeal to the Assessment Commission; or he might do so after having appealed unsuccessfully to the Assessment Commission. It is necessary to examine each of these possible cases in turn. The relevant provisions of the Act in the first case are ss. 32 and 45.

Section 32 provides: " Where any person was at the time of " the assessment taxable in respect of any property, business, " trade or profession, or in respect of any share or interest therein, " in respect of which his name was entered upon the assessment " roll, and there has been no complaint to the Court of Revision, " in accordance with the provisions of this Act, then upon the " expiration of the time hereinafter limited for the lodging of " complaints, the assessment of the property, business, trade or " profession or any share or interest therein entered opposite his " name shall be deemed incontestably to be the proper, lawful " and final assessment of the property, business, trade or profession or of his share or interest therein ".

Section 45 provides: " Upon the termination of the sittings " of the Court of Revision, or where there are no complaints " upon the expiry of the time for complaining thereto, the " secretary-treasurer shall, over his signature, enter at the foot

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"of the last page of the roll, the following certificate, filling in "the date of the entry: 'Roll finally completed this day "'of 19 '; and the roll as thus finally completed and "certified shall be the assessment roll for that year, subject to "amendment on appeal by the Alberta Assessment Commission, "and to any amendment that may be necessary to bring the roll "into conformity with the assessment of the municipality made "by the Commission, and any directions of the Commission with "respect thereto, and subject to any further amendment as "herein provided, and shall be valid and bind all parties con-"cerned, notwithstanding any defect in or omission from the "said roll or mistake made in or with regard to such roll or any "defect, error or misstatement in any assessment slip or notice "or any omission to deliver or to transmit any assessment slip "or notice".

It is to be observed that the initial words of s. 32, "Where "any person was at the time of the assessment taxable in "respect of any property . . .", govern the whole section. So, if a person was not taxable in respect of property entered against his name in the roll, this section does not purport to make that assessment incontestable or final. Section 45 only makes the roll final and binding notwithstanding defects, omissions or mistakes in it, and it is plainly only what their Lordships in *City of Victoria* v. *Bishop of Vancouver Island* (72) referred to as a "machinery section". Accordingly, there is nothing in the Act which could prevent a person who had failed to complain to a Court of Revision from pleading after the roll had become final that he was not taxable in respect of the property entered against his name in the roll.

The position at the next stage is the same. The relevant sections are then ss. 33 and 45, and the provisions of s. 33 are the same as those of s. 32 mutatis mutandis. Section 33 also begins with the words "Where any person was at the time of the "assessment taxable . . .". So an unsuccessful complaint to the Court of Revision does not prevent the person aggrieved from later raising in court the question whether he is taxable, and the decision of the Court of Revision is not res judicata.

The respondents contend that the position is different if the person aggrieved appeals from the decision of a Court of Revision to the Alberta Assessment Commission before raising the matter in the ordinary courts, and that a decision of the Assessment

(72) [1921] 2 A. C. 384.

Commission dismissing such an appeal is res judicata. If that contention is right the effect is that a person aggrieved by a decision of a Court of Revision has an option either to take the matter to court or to appeal to the Assessment Commission, so that if he appeals to the Assessment Commission and gets an adverse decision from them he cannot thereafter be heard to raise the same matter again in court.

This contention is based entirely on s. 53 of the Assessment Act, which is in these terms: "In determining all matters "brought before the Commission it shall have jurisdiction to "determine not only the amount of the assessment, but also all "questions as to whether any things are or were assessable or "persons were properly entered on the assessment roll or are or "were legally assessed or exempted from assessment". The argument is that jurisdiction has been conferred on the Commission to determine whether persons were legally assessed and no appeal from the Commission's decision has been provided, and that a decision of a tribunal which has jurisdiction to make that decision must be res judicata. But their Lordships are of opinion that s. 53 is not unambiguous. No doubt it could have the meaning for which the respondents contend: but it can also mean that the Commission has jurisdiction to determine the matters mentioned in so far as it is necessary for it to determine these matters in order to carry out its statutory duty to determine whether the assessment roll should be amended, but only for that purpose. The Court of Revision must have jurisdiction to determine those matters for that purpose because the grounds on which the Act allows a complaint to be made to that court may involve those matters, and the statutory function of the Commission is only to hear and determine appeals from Courts of Revision. There is no indication in s. 45 or elsewhere that an entry in the assessment roll which has been upheld by the Commission is in any different position from any other entry in the roll, or is any less subject to challenge in the courts. Some indication that the scope of s. 53 is not unlimited may also be got from the fact that it only confers jurisdiction to deal with questions of assessment and is silent as to questions of liability to taxation, whereas ss. 4 and 5, which are the leading sections in the Act, deal with liability to and exemption from both assessment and taxation. Moreover, their Lordships think it not irrelevant to note that originally, when appeals from Courts of Revision went to the district judge and not to the Commission, the Act provided that the decision and judgment of the judge should be final and conclusive in every case, but that after the Commission was set up to hear appeals that provision was repealed. The jurisdiction of the courts to determine questions of liability to taxation can only be ousted by clear words, and in their Lordships' judgment it is far from clear that s. 53 was intended to have that effect. Accordingly, their Lordships agree with the majority of the learned judges of the Supreme Court of Canada in holding that the decision of the Assessment Commission is not res judicata against the appellants. There being, then, no substance in the plea that the mere decision of the Assessment Commission is final and conclusive in favour of the assessment, their Lordships proceed to consider whether that assessment was, on its merits, valid or not.

First, it is necessary to determine whom, or what property, in the present case the relevant provincial legislation purports to assess to personal property tax. It may be convenient to recall at this point the relevant statutory provisions, although some of them have already been indicated. These provisions are contained in the Alberta Assessment Act, c. 157 of the Revised Statutes of Alberta, as amended: and in the Alberta Municipal District Act, c. 151 of the Revised Statutes of the Province, also as amended. Statutes of this kind can, in the case of land, in which successive or concurrent "estates" can exist, assess the persons entitled to these limited interests in proportion to their respective value. When, however, personal property (which is defined in the Assessment Act as "goods and chattels") is involved, the law knows nothing of successive estates in such property, nor do the provincial statutes pretend to assess "limited "interests" therein. Whoever is liable to pay the tax must pay it on the full cash value of the personal property assessed (see, for instance, s. 8, sub-s. 3, of the Alberta Assessment Act).

The person who is to be assessed and who is to pay is the person whose name is entered on the assessment roll under the provisions of s. 26 of the Assessment Act; and this person, in the case of personal property, is either the "owner" or the person who is "in legal possession" of the property, or both such persons (s. 26, sub-s. 1 (*l*)). While the section speaks of the "owner" or "a person in legal possession", the definition section—s. 2—provides that "owner" in relation to property other than land means "any person who is in legal possession "thereof", and seemingly, here, no one else. (What effect this small discrepancy has when the ownership of chattels is in X

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and the legal possession in Y, is obscure, but of no practical importance in this case.) By s. 5 of the Assessment Act, the following property is exempt from taxation:—" (o) every right, " title and interest of His Majesty in any property whatsoever: " . . . (z) all motor vehicles ".

By s. 125 of the British North America Act, 1867, " No lands " or property belonging to Canada or any Province shall be liable " to taxation ".

The first inquiry must, as indicated earlier, be, whether the Alberta legislation (which has not been challenged on the ground that it is ultra vires) purports to make either the property in question in this case, or the appellants in respect of that property, assessable. This involves the further inquiry, whether the appellants were, in 1947—(a) " owners ", or (b) persons " in " legal possession " of the chattels in question within s. 26, sub-s. 1 (l). Clearly, if they were neither—as, for instance, they would be if the Crown were both—the appellants are exempt.

(a) Their Lordships are of opinion that the Crown was at all material times the owner of the articles in question. Clause 15 of the contract provides: " 15. All machinery, tools, plant, " materials, equipment, articles and things whatsoever, provided " by the contractor or by the engineer under the provisions of " ss. 14 and 16 for the works, and not rejected under the pro" visions of s. 14, shall from the time of their being so provided " become, and, until the final completion of the said work, shall " be the property of His Majesty . . .".

The English decided cases have dealt not infrequently with clauses of this type: see *Brown* v. *Bateman* (73); *Blake* v. *Izard* (74); *Reeves* v. *Barlow* (75); *In re Keen & Keen* (76); Hudson, Building Contracts (7th ed.), pp. 396, 420; *Hart* v. *Porthgain Harbour Co. Ld.* (77). In some of these cases a distinction has been drawn between clauses which provide that as and when plant or materials are brought to the site they shall be " considered " or " deemed " to become the property of the building owner; and, on the other hand, clauses which provide that they are to " be and become " his property. In the former case it has sometimes been held that the clause was ineffective to achieve its aim and that the property remained in the builder, at the mercy of his creditors and trustee in bankruptcy: see *In*

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(73) L. R. 2 C. P. 272.
(74) 16 W. R. 108.
(75) 12 Q. B. D. 436.
(76) [1902] 1 K. B. 555.
(77) [1903] 1 Ch. 690.

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re Keen & Keen (78). When, as in *Reeves* v. *Barlow* (79), a decision of the Court of Appeal and, perhaps, the leading decision in the field, the formula is " be and become " or its equivalent, that case decides that the clause means what it says, operates according to its tenor, and effectively transfers the title. In *Hart* v. *Porthgain Harbour Co. Ld.* (80) Farwell, J., seems to have thought it immaterial which formula was used; but on any view " be and become " is effective, and the same must hold good of " become and be "—the wording employed in this case. It is true that apart from the case of bargain and sale of goods (and sale of goods is not here in question) either a deed, or a delivery (actual or constructive), is necessary to transfer the title to chattels inter vivos. But in the present case there was delivery on a site owned and occupied by the building owner—the Crown—and on the English cases this has been held sufficient. (It has been assumed that the words " as and when provided " in cl. 15 mean " as and when delivered on the site "; indeed, they can hardly mean anything else.) If this reasoning is well founded the plant, equipment and materials became the property of the Crown as and when so delivered.

(*b*) But the provincial statute purports to make not only the owner but any persons in legal possession of the personal property assessable. Their Lordships will, for the time being, postpone consideration of the arguments (1.) that this tax falls on " property " only and not on persons in respect of that property; (2.) that by s. 125 of the British North America Act property belonging to the Crown is exempt from taxation; and treat first, without recourse to these possible grounds of exemption, the question whether the Crown or the appellants were at the material time " in legal possession " of the relevant property. It is certainly arguable, though not in their Lordships' considered opinion more, that as and when the chattels were delivered on the Crown site, the Crown acquired, and as from then retained, not only dominion, but legal possession of them. The following arguments under this head deserve consideration:—

(1.) While it is true that the earlier part of cl. 15 makes no express provision that possession is to reside in either party, yet the latter part of the clause provides that the Crown must, when the contractual work has been completed, deliver up the property to the builders. This, it is argued, is unmeaning unless

(78) [1902] 1 K. B. 555.
(79) 12 Q. B. D. 436.
(80) [1903] 1 Ch. 690.

there has been in the first instance a delivery the other way round—by the builders to the Crown—and such a delivery would vest the legal possession in the Crown and divest the builders thereof at the material time.

(2.) A rule has sometimes been propounded in English decisions that where the contract is silent or ambiguous as to what party is to have possession, there arises a presumption that possession " runs with " the ownership: see *per* Lord Esher in *Ramsay* v. *Margrett* (81).

(3.) There must be a term implied in this case that (notwithstanding the property has passed to the Crown) the builders shall be entitled to use and handle their plant and materials. Such an implication is, in the strictest sense, " necessary to the " business efficacy of the contract "—a building contract—for without it the builders could not build; but, it is contended, it is wrong to imply more than is strictly necessary; and here the necessities of the case would be satisfied by the implication of a licence, without the further implication of legal possession.

(4.) It is further argued that the essence of legal possession is exclusive control, and that this cannot have been intended to remain in the builders because of the very wide powers of control vested by cl. 11 of the contract in the Crown's engineer.

These arguments have been most carefully considered. They commended themselves to the trial judge. But, although not lacking in formal plausibility, they seem to their Lordships, when weighed, deficient in substance and reality. Argument (4.), for instance, would seem to confuse control of operations with control of the physical instruments by which the operations are to be carried out. These may well be in different persons.

The true position, in their Lordships' view, is that while the delivery on the Crown site was a delivery to the Crown and vested the ownership in the Crown, there was a notional or actual bailment or redelivery of possession to the builders for the purpose of carrying out the building contract.

If, therefore, no other considerations were involved than those considered so far, the appellants might be judged to have been validly assessed qua persons in legal possession. There are, however, at least two other factors to be taken into account:

A. The first of these is based on the express exemption under s. 5, sub-s. 1 (*z*), of the Assessment Act, of " all motor vehicles ". In the assessment were included certain articles the character

(81) [1894] 2 Q. B. 18, 25.

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of which qua " motor vehicles " within the meaning of this head of exemption is not challenged in these proceedings, namely, three motor vehicles of a type called " dumptors ". They were not an insignificant component of the total subject-matter of the assessment. The Assessment Commission reduced the assessed values standing in the assessment as it emerged from the Court of Revision; but, as their Lordships read the Commission's decision, it merely scaled down the amounts without excising or varying any items against which these amounts were tabled. The Supreme Court of Canada, on the other hand, dealt with this situation by deleting the three " dumptor " items as items and approving the reduced assessment subject to this deletion. Their order was: " AND this court did further order and adjudge " that the appellant is entitled to a declaration that the assess- " ment and taxation of all the personal property in question in " this action, except the dumptors, were properly made and " imposed ".

With great respect to the Supreme Court, their Lordships feel bound to express their view that the course adopted by that court was not open to it. When an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a court can sever the items and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not dismissible as " de minimis ") is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly. That matter is covered by authority. In *Montreal Light, Heat & Power Consolidated* v. *City of Westmount* (82) the court (see especially *per* Anglin, C.J.) in these conditions held that an assessment which was bad in part was infected throughout, and treated it as invalid. Here their Lordships are of opinion, by parity of reasoning, that the assessment was invalid in toto.

B. This would be a sufficient reason for allowing the appeal; but their Lordships think it desirable to deal with a second ground on which the assessment was impeached, having regard to the elaborate argument which was directed to it.

It has been noted that s. 125 of the British North America Act, 1867, provides that " No lands or property belonging to

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(82) [1926] S. C. R. (Can.) 515.

"Canada or any Province shall be liable to taxation". A solution of the present problem, tempting in its simplicity, is to say that the chattels in question in this case belong to the Crown in right of the Dominion of Canada and cannot be the subject-matter of taxation, whoever may be in legal possession of them: that there is no subject-matter on which a provincial taxing statute can operate. The appellants hesitated to put their case as high as this, feeling that it would be difficult to reconcile such a submission with a number of decided cases, including some decisions of this board, where the subject was taxed although the ownership was in the Crown. Much argument was directed to the question whether the present tax or assessment was of "property", or of "persons in respect of that property": the first alternative favouring this extreme contention open to the appellants.

On this point the following considerations seem to their Lordships relevant:—(1.) Of course, no tax literally falls on "property" only as opposed to "persons". All taxes are physically paid by persons. But (2.), this particular tax cannot be exacted as a debt from the person on the assessment roll. Provisions for exacting taxes on land as debts due from the person assessed (see s. 305 of Municipal District Act) are not reproduced when it comes to taxes on personal property. (3.) The provincial Acts in this connexion in some passages speak of tax on personal property or tax on persons in respect of their personal property, almost interchangeably; but it is perhaps not without importance that the actual charging section in the present case—s. 288 of the Municipal District Act—speaks of a tax "upon the assessed value of all . . . personal property". The section reads as follows: "288. Upon the completion of the "estimate of probable expenditure the council shall proceed to "make an estimate of the probable revenue of the municipal "district for the year to be derived from business taxes and "sources of revenue other than taxation, and shall by by-law "authorize the secretary-treasurer to levy for ordinary municipal "purposes upon the assessed value of all lands, improvements "and personal property set out in the assessment roll, a tax at "such uniform rate on the dollar as the council deems sufficient "to produce the amount of the expenditures as estimated by the "council less the amount of the estimated probable revenue from "business taxes and sources other than taxation, due allowance "being made for the amount of taxes which may reasonably be "expected to remain unpaid, and for the offset of business or "improvement tax as hereinafter provided for".

It may well be, therefore, that the tax is properly to be regarded as a tax on property and on property only. There is as against this the following circumstance to be taken into account:—In cases, at least where *land* has been concerned, it has been held that if the language of the provincial statute is sufficiently explicit and compelling, A may be taxed in respect of property "belonging" to B. Even where B is exempt, e.g., where B is the Crown, property belonging to B may be taken as a fictional measure of the tax to be exigible from A, provided always that the Act makes this intention perfectly clear.

Their Lordships have not in mind the case often cited in this connexion of *City of Halifax* v. *Fairbanks' Estate* (83), because in that case the special legislation provided that land let by the subject to the Crown should be treated as still occupied by the subject. This is clearly not a case of property "belonging" to the Crown at all. The property "belonged" to the subject and was let to the Crown. The same consideration applies to the *City of Vancouver* v. *Attorney-General for Canada* (84), where again the subject (the C. & P. Railway) leased land to the Crown and was assessed under the terms of the provincial statute which charged the lessor in respect of the whole value of such land. Rather they have in mind cases such as *Smith* v. *Vermillion Hills Rural Council* (85); *Rural Municipality of Spy Hill* v. *Bradshaw* (86); and *City of Montreal* v. *Attorney-General for Canada* (87).

In *Smith* v. *Vermillion Hills Rural Council* (88) the appellant was assessed, under Saskatchewan Statutes 6 Edw. VII, c. 36, and 7 Edw. VII, c. 3, in respect of Dominion land of which he held grazing leases from the Crown. "Land" was defined in such statutes as including any estate or interest therein. It was held that the statutes should be read as imposing the tax on the appellant's interest in the land. This case is clearly distinguishable from the present appeal on the ground that the relevant provincial statute dealing with "land" (in which successive interests and estates can subsist) provided that that term should include "any estate or interest therein" and that every "owner "or occupant" should be liable to be taxed for "land owned or "occupied by him". It was held, affirming the Supreme Court

(83) [1928] A. C. 117.
(84) [1944] S. C. R. (Can.) 23.
(85) [1916] 2 A. C. 569.
(86) (1912) 2 W. W. R. 399.
(87) [1923] A. C. 136.
(88) [1916] 2 A. C. 569.

of Saskatchewan and the Supreme Court of Canada, that the tax was not imposed on the land itself, so as to conflict with s. 125 of the British North America Act, but was imposed only on the "interest" of the appellant as a tenant thereof. The Supreme Court of Canada had reached a similar conclusion in *Calgary & Edmonton Land Co.* v. *Attorney-General for Alberta* (89).

In *City of Montreal* v. *Attorney-General for Canada* (90) the material provincial taxing provision (art. 362A, added to the City of Montreal Charter by 7 Edw. VII, c. 63, art. 19) provided that persons occupying for certain purposes Crown buildings or lands should be taxed as if they were actual owners. The tenant of such buildings and lands did not pay. The Judicial Committee held, following the *Vermillion Hills* case (88), that the tax was only on the tenant's interest during his occupation, and was not a tax "on" Crown lands and as such ultra vires s. 125 of the British North America Act.

In the present case:—(1.) "lands" are not involved, but personal property, in which estates do not exist; (2.) there is no express provision that the subject is to be liable to any extent in respect of Crown property, or that the exemption accorded to such property shall not extend to the subject who may have some interest therein (contrast, cf., *City of Montreal* v. *Attorney-General for Canada* (90)); (3.) all that is said is that (without specific reference to Crown property) the subject shall be liable where in legal possession; (4.) this leaves it open to doubt whether "person in possession" covers a person in possession of Crown property. Where the terms and scope of incidence of such a provision are in any doubt they should, if possible, be construed so as not to conflict with s. 125 of the British North America Act—and that accord can in the present case best be secured by reading persons "in legal possession" as limited to persons who would be taxable if owners in possession; and the Crown, who are the owners, would not have been taxable if in possession; (5.) lastly, according to the terms of s. 26, sub-s. 1 (*l*), itself, the person to be entered on the assessment roll is not the person in legal possession of any personal property, but the person "in legal possession of assessable personal property"; and Crown property not being taxable is a fortiori non-assessable.

For these reasons it appears to their Lordships that even if motor vehicles had not been included in the assessment, it would still, for the reasons indicated above, have been invalid.

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(89) (1911) 45 S. C. R. (Can.) 170.

(90) [1923] A. C. 136.

Their Lordships will accordingly humbly advise His Majesty that this appeal ought to be allowed, the judgment of the Supreme Court of Canada set aside and the judgment of the Appellate Division of the Supreme Court of Alberta restored, and that the respondents ought to pay the appellants' costs of the appeal to the Supreme Court of Canada. The respondents must pay the appellants' costs of this appeal.

Solicitors: *Lawrence-Jones & Co.; White & Leonard.*

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1951
Jan. 22, 23, 24, 25;
May 10.

[HOUSE OF LORDS.]

TROILUS (CARGO OWNERS) . . . . APPELLANTS;

AND

GLENOGLE (OWNERS, MASTER AND CREW) . RESPONDENTS.

Shipping—Salvage—Ocean towage—Indian Ocean to United Kingdom—Original salvor substituted for another at Aden—Place of safety—No facilities for repair to disabled ship or tug services practicable abroad—Towage continued to Falmouth—Whether salvage or towage after Aden—Liability of cargo-owners to contribute to salvage award.

A steamship carrying a general cargo to Liverpool, having lost her propeller in the Indian Ocean, but being otherwise unimpaired, accepted assistance from a motor-vessel which towed her to a safe anchorage at Aden where she could not, however, be repaired and where there were no facilities for discharging and storing the cargo. This admittedly constituted salvage services. From Aden the damaged ship was towed by another vessel to the United Kingdom, since repair in the Mediterranean would have been difficult and would have involved considerable delay. The cargo owners contended that this constituted, not salvage services but ocean towage.

Held, that although the ship and cargo were in physical safety at Aden, the services in question were salvage services.

The master of a damaged ship must do his best to preserve the ship and cargo and bring them to their destination as cheaply and as efficiently as possible, bearing in mind expense and the effect of delay on both and considering the possibility of transhipment or of repair at some convenient port. Salvage lasts so long as the master acts reasonably for the combined benefit of ship and cargo in the light of these considerations. A salvage award held reasonable in the case of a ship would be held reasonable in the case of the cargo also unless it were established that the master neglected its interests.

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* *Present:* LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD REID and LORD TUCKER.

Decision of the Court of Appeal (sub nom. *The Troilus*) [1950] P. 92 affirmed.

APPEAL from the Court of Appeal (Bucknill, Somervell and Denning, L.JJ.).

The facts, stated by Lord Porter, were as follows:—The S.S. *Troilus*, a former American Liberty steamship of 7,275 tons gross register, was carrying a general cargo from Australia to Liverpool. In the course of her voyage on July 2, 1948, when in the Indian Ocean and about 1,050 miles from Aden, she fractured her tail shaft at the end of the stern tube and dropped her propeller. On July 5 she was picked up by the m.v. *Stentor* and towed to Aden, where she anchored in the quarantine anchorage on July 12. Alfred Holt & Co. Ld. were the managers of the *Troilus* and of the *Stentor*, which were both owned by the Ocean Steamship Co. Ld. They were also managers of the m.v. *Glenogle* owned by the Glen Line Co. Ld. On July 9 Alfred Holt & Co. Ld. by wireless had asked the master of the *Glenogle* whether he could tow the *Troilus* from Aden to Liverpool, and the master of the *Glenogle* replied "Yes". The *Glenogle* was a twin-screw motor ship of 9,513 tons gross register and was bound from Australia to the United Kingdom with a general cargo.

On July 13 the master of the *Troilus* told the master of the *Stentor* (who was then ready to resume towage to Suez) that he would not be ready for two days, and on July 14 the owners of the *Stentor* instructed her master to proceed upon his voyage if the master of the *Troilus* was satisfied to lie at anchor off Aden. On the same day Alfred Holt & Co. Ld. sent instructions to the *Glenogle* to tow the *Troilus* to the United Kingdom. The *Stentor* then proceeded on her voyage. The *Stentor* had a single screw, whilst the twin screws of the *Glenogle* presumably made her more efficient for towing purposes. The *Stentor* also had to call at various ports in the Mediterranean en route for England.

On July 16 the *Glenogle* arrived at Aden, and on July 17 made fast to the *Troilus*, which had remained at anchor in the same position, and started to tow her to Suez. The *Troilus* did not carry a spare propeller and tail shaft, but there was a spare of each in England. Alfred Holt & Co. Ld. considered the question of sending these spares out to the *Troilus*, and made inquiries for that purpose. On July 16 they received a cable from Port Said to say that the engineering works there could fit the spare propeller to the *Troilus* by tilting her stern sufficiently to clear the shaft aperture above the water line, and estimated the time, including the handling of cargo, at a month. On July 20 Alfred Holt & Co. Ld. inquired whether a dry dock at Malta was available for the *Troilus* on about August 1, and the reply was that no docks were available before the end of September. On July 21 they cabled Port Said to ask whether a dry dock was available at Alexandria for the *Troilus* to be docked with cargo on board, and received the reply on July 22—" suitable dry dock not " available before August 15 not guaranteed do not recommend ".

About July 22 Alfred Holt & Co. Ld. also inquired whether there was any suitable tug in the locality which could tow the *Troilus* to the United Kingdom, and ascertained that the tug *Empire John*, belonging to William Watkins Ld., would be available at Taranto on or about July 30, and would be able to tow the *Troilus* at approximately 4 knots, and the owners of the tug gave a quotation of 6,000*l.* to tow the *Troilus* from off Malta to Liverpool. Alfred Holt & Co. Ld., however, were unwilling to entrust the ship to one tug for towage across the Bay of Biscay, and decided that the most satisfactory course, in the interests of all concerned in the safety of ship and cargo, was for the *Glenogle* to tow the *Troilus* to Falmouth.

The *Glenogle* towed the *Troilus* to Suez, which was reached on July 25, at an average speed of 6.8 knots. Tugs then towed the *Troilus* through the Suez Canal, and on July 29 the *Glenogle*, having proceeded through the canal ahead of the *Troilus*, made fast to her outside Port Said, and continued with the towage. On August 3 the vessels were near Malta, and on that day tug and tow were proceeding at a speed of 8½ knots. On August 8 they passed Gibraltar, and on August 15 they reached Falmouth Bay. The *Troilus* then anchored and was subsequently towed to Liverpool by two tugs. The average speed of the towage from Port Said to Falmouth, a distance of 2,980 miles, was 7.3 knots.

In the present action, the owners, master and crew of the *Stentor* claimed salvage for services rendered to the cargo of the *Troilus*, and her master and crew also claimed salvage for services rendered to the *Troilus* herself. Lord Merriman, P., awarded 18,000*l.* in respect of these services. The services rendered by the *Stentor* were admitted to be salvage services and there was no appeal against the part of the award in her favour.

The owners, master and crew of the *Glenogle* likewise claimed reward for salvage services rendered to the *Troilus*, her cargo and freight. Lord Merriman, P., made an award of 22,000*l.* in their favour. The value of the interests concerned were agreed at ship 193,350*l.*, cargo 888,000*l.*, freight at risk 15,410*l.* The owners of the *Troilus* did not appeal, but the cargo owners appealed and the award was affirmed by the Court of Appeal. The cargo owners appealed to the House of Lords, contending that the services rendered were not salvage. It was admitted that if they were salvage the amount of the award was not excessive.

Nelson, K.C., and *Vere Hunt* for the appellants, the cargo owners. Salvage is a special reward given for rescuing vessels in distress and necessarily involves danger to the vessel salved at the time when she is salved. Salvage means rescuing a ship in danger and taking her to the nearest port of refuge. A salvage service must start from a position of danger and involves rescue from maritime perils, either actual or anticipated, of the property, the subject of the salvage. If there is no danger there can be no salvage. No agreement between the masters and the owners of the vessels concerned can turn what is not a salvage service into a salvage service. The owners of a ship may agree to pay on a salvage basis, irrespective of what the service is, but that does not affect the question whether or not there is a salvage service. The onus is on the plaintiffs, the owners, master and crew of the *Glenogle*, to prove that the services rendered were salvage and not towage.

The *Stentor* in fact salved the *Troilus* and her cargo, bringing them to a place of safety at Aden. Even if the *Stentor* had completed the whole journey towing her to the United Kingdom, the salvage would have ended at Aden, the service thereafter being towage. A vessel is none the less in a place of safety because she is not where her owner wants her to be or where she can be repaired. Questions of degree cannot affect the main question whether or not she was lying in a place of safety. The test is the question: is the ship in such a state that no prudent master would refuse services on a salvage basis? Once a ship is in safety one cannot even start a salvage service at all. Even if the ship did start in a position of danger, once she has got to a safe port the salvage ends. The *Glenogle* was not rendering salvage services because she was towing the *Troilus* from one place of safety to another: the sole test is whether she was rescuing the *Troilus* from danger or anticipated danger, and not whether the owners of the *Troilus* were acting in a businesslike and economical manner.

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The evidence does not support the finding that either the *Troilus* or her cargo was in any peril at Aden, but, even assuming that they were, there was no danger at Port Said or Suez, and at Port Said she could have been repaired. Therefore beyond these places at any rate no claim for salvage can be established.

As to the law, see the Merchant Shipping Act, 1894, s. 546; Abbott on Shipping (14th ed.), pp. 960–2; Kennedy on Civil Salvage (3rd ed.), pp. 2, 8, 20, 24, 33, 233, 248; Halsbury's Laws of England (2nd ed.), vol. XXX, p. 880; *The Neptune* (1); *The Portreath* (2); *The Reward* (3); *The Watt* (4); *The Charlotte* (5); *The Batavier* (6); *The Albion* (7); *The Princess Alice* (8); *Colby* v. *Watson* (*The Endeavour*) (9); *The Germania* (10); *The Sunheath* (11); *Melanie* (*Owners*) v. *San Onofre* (*Owners*) (12); *The Homewood* (13); *The Idomeneus* (14); *The Laomedon* (15); *The Leon Blum* (16); *Anderson, Tritton & Co.* v. *Ocean Steamship Co.* (17) and *The Sabine* (18). *The Syria* (19) is vitally different from the present case in that the ship was admittedly in danger at Ascension. *The Glaucus* (20) is not decisive on the facts of the present case.

Further, the judgment appealed from results in an injustice to the cargo owners. The ships concerned were owned by associated companies and were under the same management, and, while the owners of the *Troilus* are liable for less than one-fifth of the sum awarded, the cargo owners are liable for the rest, although in consideration of the freight the owners were under a duty to carry that cargo to its destination. The arrangements made as to salvage were prejudicial to the cargo owners and should not be binding on them.

Vere Hunt following. There is an analogy between cargo salvage and life salvage in that, as in the case of cargo, life is of little use if put on an isolated uninhabited island where it may perish, though not from perils of the sea. In such a case, though the salvage is complete, the salvor would be entitled to little in respect of a cargo so salvaged because it would be valued at that

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(1) (1824) 1 Hagg. Adm. 227, 236–7.
(2) [1923] P. 155, 159.
(3) (1841) 1 W. Rob. 174.
(4) (1843) 2 W. Rob. 70.
(5) (1848) 3 W. Rob. 68.
(6) (1853) 1 Spinks 169, 171.
(7) (1861) Lush. 282.
(8) (1849) 3 W. Rob. 138, 142.
(9) (1848) 6 Moo. P. C. 334.
(10) [1904] P. 131.
(11) (1925) 22 Ll. L. Rep. 361.
(12) [1925] A. C. 246.
(13) (1928) 31 Ll. L. Rep. 336.
(14) (1925) 22 Ll. L. Rep. 299.
(15) (1925) 23 Ll. L. Rep. 230.
(16) [1915] P. 90.
(17) (1884) 10 App. Cas. 107.
(18) (1879) 101 U. S. 384.
(19) (1874) Shipping Gazette, July 7, 1874.
(20) (1948) 81 Ll. L. Rep. 262.

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place. [He referred to *Cargo ex Woosung* (21); *The Suevic* (22); *Wells* v. *Gas Float Whitton No.* 2 (*Owners*) (23); *The Mariposa* (24) and the Merchant Shipping Act, 1894, ss. 544 and 546.]

Naisby, K.C., and *J. B. Hewson* for the respondents, the claimants. Life salvage is a creature of statute (see Kennedy on Civil Salvage (3rd ed.), p. 56), and the standard to be adopted in relation to it is different from that to be adopted in the case of property. In such circumstances as the present two different questions may arise: (a) When can a salvor recover a salvage award? (b) By whom is that salvage award ultimately payable? These are two different matters not to be confused. The question in the present case is this: is the *Glenogle* entitled to a salvage award in respect of the cargo of the *Troilus*? It is not: out of whose pocket will the award ultimately come?

If a vessel suffers a breakdown of her engines at sea and is obliged to take salvage services the award of salvage is made against the ship, cargo and freight, and judgment is given against those interests. If the salvage award is paid by one of the interests (e.g., the shipowners), and they seek to recover the cargo owners' share in general average, it is open to them to say that they are not obliged to pay, e.g., on the ground that, by reason of a breach of the contract of seaworthiness of the ship, the shipowners must discharge the cargo owners' share of the award: see also *Anderson, Tritton & Co.* v. *Ocean Steamship Co.* (25). Similarly, if a salvor recovers an award of salvage against the cargo owners which is not ultimately payable by them, they are entitled to bring an action against the shipowners for the salvage they were obliged to pay in the first instance in the action brought against them direct by the salvor: see *The Princess Royal* (26). The cargo owners might recover from the shipowners on the ground of a breach of their contract as carriers in incurring unjustified expenses. Thus what has been done by the master of the carrying ship cannot affect the nature of the service rendered by the salvors. If the ship acted improperly the cargo owners may resist a claim in general average or recover from the shipowners.

The services rendered by the claimants were salvage services, in towing a disabled vessel, and nothing happened to alter them from salvage until the final arrival in English waters. The law is correctly stated in Kennedy on Civil Salvage (3rd ed.),

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(21) (1878) 3 Asp. M. C. 50, 56.
(22) [1908] P. 154, 157.
(23) [1897] A. C. 337.
(24) [1896] P. 273.
(25) 10 App. Cas. 107.
(26) (1870) L. R. 3 Ad. & E. 41.

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pp. 20, 24. See also *The Ellora* (27). The *Troilus* when picked up by the *Stentor* was in no immediate danger; if she had been, the amount of the salvage might well have been far more. But she was in a state of anticipated danger and at Aden she was still in that state. Both the courts below found as a fact on the evidence that she was in danger there. A small degree of danger is sufficient to found a claim for salvage in the case of a disabled ship, and so long as the disablement continues the danger continues, at any rate while she is still at sea, and sometimes while she is in port.

In the present case the *Troilus* was still in danger while at Aden. Being without motive power she could not extricate herself from any peril. She was in danger when the service of the *Stentor* began and after it ended. Salvage services can be and often are rendered by a number of successive salvors. The services in the present case were in fact of that nature.

Once a service starts as a salvage service it persists as salvage as long as the disablement persists or until the ship reaches a safe place, viz., the port of destination at which the cargo is to be delivered. Alternatively the salvage extends to the nearest practicable port of repair, and on that test, in the circumstances of the present case, the salvage continued all the way to Falmouth. The salvage service lasts until the effect of the maritime peril is past. Thus, if after stranding a ship is listing and leaking, the service remains salvage even after she is refloated. It is salvage to render an immobile ship mobile. If a ship were lifted by a typhoon into waters shut in by a coral reef anyone who dug a channel for her to get out would render salvage services. Similarly if a typhoon blew a ship out of the water inland it would be salvage to get her back into the water because it would be saving her from the consequences of perils of the sea. Any towage of a disabled ship is salvage provided it results in the success of the operation. Thus if the *Troilus* had been eventually lost, the *Stentor* could have recovered nothing.

The salvage continued as far as Falmouth, for till then the *Troilus* remained in the same condition as when she was first picked up (viz., without engine power). Her position was no different. It was not practicable to repair her in Egypt, where there was no available dry dock. Had she been repaired there the cargo would have had to be discharged, stored and reloaded, and such extra handling would have increased the risk of damage to it. The shortest period of repair would have been a month and the ship would have reached her destination later than in fact she did. No dry dock was available at Malta until the end of September. The commercial towage available was not suitable. The longer the ship remained motionless in a Mediterranean temperature the greater the chance of deterioration of the cargo. The master and the owners in considering the prudent course had to consider the whole adventure and not merely a particular part. The interests of ship and cargo may sometimes be in conflict, but that was not so here. The *Troilus* and her cargo were immobilized and useless to their owners till the services were concluded, and those services benefited the cargo owners in that they were the quickest means of getting the cargo to its destination.

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(27) (1862) Lush. 550.

Reliance is placed on *The Syria* (28); *The Idomeneus* (29); *The Laomedon* (30) and *The Glaucus* (31). In none of the cases is there anything contrary to the claimants' submissions, and there is much to support them. See also the *The Stiklestad* (32); *The Maasdam* (33); Scrutton on Charterparties (15th ed.), pp. 281, 284 and 322, and Kennedy on Civil Salvage (3rd ed.), p. 25. To allow the appeal would be contrary to a line of authorities which has stood for a long time.

J. B. Hewson following. In the open roadstead at Aden the *Troilus*, without any means of propulsion, was no more than a hulk without the benefit of the specially heavy moorings of a hulk; she was no more than a floating warehouse. A prudent man would have wished to get her away at the first convenient moment. The *Glenogle* took her from Aden, just as in *The Syria* (34) the *American* took the *Syria* from Ascension. The *Troilus* needed a pull from a complete standstill. [He referred to *The Laomedon* (35); *The Reward* (36); *The Princess Alice* (37) and Kennedy on Civil Salvage (3rd ed.), p. 25.]

Nelson, K.C., in reply. It is not salvage to go to the aid of a ship securely anchored in harbour; that is the core of the matter. As to the onus of proof, see Kennedy on Civil Salvage (3rd ed.), p. 20. The onus is on the *Glenogle* to satisfy the court that when she came up with the *Troilus* she was in danger in a salvage sense. At Aden there was no danger to be considered

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(28) (1874) Shipping Gazette, July 7, 1874.

(29) 22 Ll. L. Rep. 299.

(30) 23 Ll. L. Rep. 230.

(31) 81 Ll. L. Rep. 262.

(32) [1926] P. 205; affd. in C. A. (1926) 43 T. L. R. 118.

(33) (1893) 7 Asp. M. C. 400.

(34) (1874) Shipping Gazette, July 7, 1874.

(35) 23 Ll. L. Rep. 230, 234.

(36) 1 W. Rob. 174, 177.

(37) 3 W. Rob. 138.

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save from a freak storm, which there was no reason to anticipate. Ship and cargo could have lain there in safety indefinitely. Even if it be held that the cargo was rescued from Aden, the *Troilus* was brought to anchor at Suez where there was no danger; she was certainly not less in danger at Falmouth. From the point of view of danger no prudent master would have taken salvage at Suez. The commercial point of view is irrelevant since one does not salve time or cost, and the factors relevant to saving them are not relevant to salvage. Further, one cannot have a sequence of salvage, no salvage and salvage again, and it is important that in the Suez Canal there was towage. Salvage must have a termination and that does not depend on where the master chooses to send his ship; it is a matter of law. As to salvage ending and towage beginning, see *The Leon Blum* (38).

Their Lordships took time for consideration.

May 10. LORD PORTER. My Lords, this is an appeal by the owners of cargo lately laden on board the S.S. *Troilus* from the judgment of the Court of Appeal affirming an award made by Lord Merriman, P., of 22,000*l.* for salvage of that vessel, her cargo and freight, to the owners, master and crew of the m.v. *Glenogle*. If the award was justified—i.e., in the circumstances which existed, if the service was a salvage service—the appellants are liable to pay the amount of the award. Their contention is, however, that at any rate, so far as they are concerned, that service was not salvage inasmuch as before it was rendered the *Troilus* had reached a position of safety and salvage is only payable in a case where the ship against which the claim is made is in a position of danger. [His Lordship stated the facts, as set out above, and continued:]

On the facts the appellants contended that the services rendered, after Aden had been reached, were towage and no longer salvage. "Salvage services", they said, "are only those "which are rendered to a ship in danger." Once the *Troilus* had reached Aden she was in perfect safety, except, perhaps, in case of a freak storm, which there was no reason to anticipate, and in the ordinary course ship and cargo could have lain there indefinitely without danger to either. The cargo, it appears, consisted of various kinds of foodstuffs, but, as the President found, was not strictly perishable and was in no immediate danger

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(38) [1915] P. 90, 101.

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of perishing. A few weeks' delay, he said, at any rate, would not injure it. The argument before your Lordships, as I understood it, was that the *Stentor*, having finished her service and left the *Troilus* in physical safety at Aden, the incidents prior to her coming to anchor there became irrelevant and the only question was: had the *Glenogle* taken her from a position of danger to one of safety?

On this argument the first question to be answered is: was the *Troilus* in physical danger whilst lying at Aden? In *The Glaucus* (39) Willmer, J., held that a vessel which had suffered such damage to her boilers as could not be repaired at Aden was in danger whilst lying at the quarantine anchorage there. Lord Merriman, P., and Bucknill, L.J., came to the same conclusion in reference to the *Troilus*.

In the course of the hearing of the appeal, the assessors in the Court of Appeal were asked whether the *Troilus* was in danger whilst at anchor off Aden, and replied: " No immediate danger, " but in the event of an unusual gale springing up she would " certainly be in greater danger than a ship with all her main " power available ". In a sense, the answer is a truism. Any ship without motive power not in dock or securely tied up in a sheltered harbour is in greater danger than one capable of motion, but the question under consideration is not an abstract one but whether a prudent master would be reasonably apprehensive of physical danger having regard to the weather to be anticipated in the locality whilst his ship lay in the anchorage which she had reached. We asked our assessors: Would a prudent master of a steam vessel apprehend any appreciably greater danger in lying for an indefinite time with a broken tail shaft in a harbour with the features of the outer harbour at Aden, and subject to the conditions indicated in the Red Sea and Gulf of Aden Pilot as to that port, than he would if his ship were so lying in such a condition that he was able to use her propellers?; and they answered: " No, provided she was equipped with proper tackle " to keep her at anchor ", and added that she was in fact so equipped. For the purpose of deciding this case I am prepared to accept that answer, though I am not sure that it means more than that the *Troilus* was safe enough for all practical purposes. It has to be remembered, however, that in the long run the ship would deteriorate if not removed, and, likewise, the cargo, which consisted of foodstuffs, would do so at an earlier period.

(39) 81 Ll. L. Rep. 262.

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The ship admittedly could not be repaired at Aden and no one suggested that there were facilities for discharging or storing the cargo at that port. Nevertheless, whatever view may be taken of *The Glaucus* (40), that case cannot be decisive of the facts of this. Moreover, I agree with Bucknill, L.J., that there is no general rule that where a ship is for some reason or other without motive power she and her cargo are still in danger until she is repaired. The solution of the question whether a ship and cargo have reached a place of safety must, I think, depend upon the facts of each case, one of which is the facility for repairs at the place in question, and another the possibility of safely discharging and storing the cargo and sending it on to its destination and the danger of its deterioration. It is not a sufficient answer to say that she can lie in a particular position of physical safety. It must be remembered that in every voyage of a merchant ship carrying cargo the interests of both ship and cargo have to be borne in mind.

In saying this I am not determining in one way or the other, in a case in which a decision to that effect is not required, that if the *Troilus* had lost her propeller whilst lying at Aden, a ship which towed her to a port of safety would be entitled to salvage. In this case the services began as salvage rendered by a ship managed by the same company and were continued by another so managed because that was the safest, quickest and most convenient method of towage. It was for the joint advantage of the *Troilus* and her cargo, because the *Glenogle* was a better ship for the towage required and was sailing direct to this country, and because the *Troilus* was not ready to proceed until after the *Stentor* would and did leave in the ordinary course of her voyage. Admittedly, salvage services can be rendered by two ships in succession, and I see no reason for holding that if the *Stentor* had towed throughout it might have made the whole of the service rendered salvage, whereas the substitution of the *Glenogle* would have put an end to any such claim. Once this aspect of affairs is accepted the same question arises at Aden which afterwards arose at Suez and Port Said, i.e.: Does the fact that the *Troilus* could lie in physical safety at any of the three ports transform a service which began as salvage into towage and nothing more? There are a number of authorities, beginning with *The Syria* (41), which was decided by Sir Robert Phillimore in 1874 (the record of which has been furnished to us), which say that it does not.

(40) 81 Ll. L. Rep. 262.

(41) (1874) Shipping Gazette, July 7, 1874.

That vessel was towed from Ascension, where she was held to have been in danger, to Southampton, but on the way calls were made at Goree, at St. Vincent and at Madeira, in all three of which she and her cargo were physically safe.

It was sought to distinguish that case on the ground that the *Syria* was admittedly in danger at Ascension, but so was the *Troilus* when picked up by the *Stentor*, and if, as I have indicated, the case is to be regarded as if the *Stentor* had been the towing ship throughout the voyage, the circumstances of the two cases are very much alike. In *The Syria* (41) the cargo was made liable as well as the ship, and though the master asked to be towed to Southampton the service was held to be a salvage service, and the only difference between that and the present case is that it was the master and not the manager who made the request.

In the course of his judgment Sir Robert Phillimore says: "I have paid all attention to Mr. Butts' argument with respect "to the first point, that the salvage service ceased at St. Vincent, "but I am unable to assent to it. I put out of consideration the "fact that both the vessels belonged to the same owners. The "principle of law is independent of that fact. This service was "simply salvage service and it was intended to extend to towing "this vessel to her port of destination, and the fact that she "touched at a port where she might have remained in safety does "not seem to alter the original contract or make the service cease "there or begin there. What the question might have been in "a case where the master of the towed vessel expressed himself "satisfied and did not wish to be towed further and made no "arrangement by implication or parol is another consideration "altogether. I consider it as a salvage service continuing over "the whole of the six weeks". My Lords, the basis of this judgment appears to be that a ship taken from a position of danger to her ultimate destination is still the subject of salvage, though on her voyage she is towed past or indeed into ports at which she could lie in safety provided, of course, she continues to be so damaged that it would be unsafe for her to put to or remain at sea until she is repaired.

Nor, as I think, does *Anderson, Tritton & Co.* v. *Ocean Steamship Co.* (42) in any sense make this outlook untenable. The action was in general average by a shipowner against one of the cargo owners for his proportion of the sum which the shipowner had consented to pay for salvage services rendered to the ship and cargo. Admittedly, the services were salvage services, and

(42) 10 App. Cas. 107.

consequently the cargo owners would have to contribute to the sum due to the salvors. The dispute was as to how much their share should be and how the sum to be awarded should be ascertained.

The case was tried with a jury, and it is enough to set out two of the questions put to them: (1) Did the master of the *Achilles* (the salved ship) make her owners liable to pay a named sum? (2) Was that a reasonable course for him to pursue under the circumstances? To both questions the jury answered "Yes". But that fact was held not to be conclusive against the cargo owners. "I do not think", says Lord Blackburn (43), "that "the owners of the *Achilles* could, by paying the claim of the "*Shanghai*" (the salving ship), "entitle themselves to recover "more from the goods owners than the *Shanghai* could have "recovered in a salvage suit against the goods owners, but I do "not see why they might not recover whatever it was fair and "just should be paid as a contribution." He says further (44): "I think therefore that it was quite clear that there was a "contract binding on the owners of the *Achilles* to pay this sum "of 2,691*l*. 19*s*. 6*d*. to the owners of the *Shanghai*, whether it "was made by themselves or by their master for them is, as far "as regards the binding of the owners of the *Achilles*, unim"portant. But neither the owners of the ship nor their master "have authority to bind the goods, or the owners of the goods, "by any contract. The master has I think authority to make "for his owners all disbursements which are proper for the "general purposes of the voyage, and when once those disburse"ments are paid for, either by the master out of funds belonging "to the owners which the master has, or by funds which the "owners themselves apply to discharge a contract which they "either could not dispute because the master had bound them "to make it or did not choose to dispute, I think that the dis"bursement, in so far as it is a disbursement for the salvation "of the whole adventure from a common imminent peril, may "properly be charged to general average. But I think that there "is neither reason nor authority for saying that the whole amount "which the owners of the ship choose to pay is, as a matter of "law, to be charged to general average. And though I quite "agree that there is some evidence here that the *Achilles* and her "cargo were both in danger, and were both saved by the services "of the *Shanghai*, and though I also agree that it is not a

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(43) 10 App. Cas. 107, 114.

(44) Ibid. 117.

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"question of law whether the amount of the sum charged as a "disbursement was exorbitant or not, still I cannot find that any "question as to the amount was submitted to the jury".

No question arose as to the point at which the service began or ended; the sole matter in dispute was what was a reasonable remuneration for the service rendered to ship and cargo. The ship must, of course, pay the contractual sum, but the cargo owners were liable not for their proportion of the sum paid but for their proportion of what would properly be awarded for the services rendered if no contract had been made. It differs from the case now under discussion in that the quantum has here been determined by an Admiralty judge in a Court of Admiralty and the only matter of contention is where the service began and ended.

The master or owner or manager of the vessel alleged to have been salved cannot, of course, bind the cargo owners to pay salvage where the services rendered are not salvage services, any more than he can bind him to pay the amount which he has promised to the vessel which is said to have salved his ship. But this qualification in no way determines what are salvage services or how long they last. There is some authority for the proposition that a vessel so damaged as to be unable to proceed except under tow is receiving salvage services not only when she is picked up in a position of danger but continues to enjoy those services until she reaches her destination, and both *The Reward* (45) and *The Princess Alice* (46) differentiate between salvage and towage by attributing the former to the towing of a disabled ship and the latter to the mere acceleration of the tow's progress.

My Lords, I have already said that in my view this statement as to the difference between the two services must not be carried too far and that I agree with Bucknill, L.J., that there is no established principle that a vessel which has no means of progression remains in a state of danger until she has recovered some power of propulsion, even though she has come to anchor in a safe place. But your Lordships are still faced with the question —What in this collocation is meant by a safe place? Are there only the three alternatives, either (1.) a place where the ship can lie in physical safety even though she cannot be repaired there and may have to remain for an indefinite time until some problematical tug or tugs can be procured to tow her away at a fixed contract price for the towage service; or, (2.), some place where she can ultimately be repaired with or without some risk but after a very considerable delay, the cargo meanwhile being either partially or wholly discharged and stored until the ship is repaired or until space in some other ship can be obtained to carry it to its destination; or, (3.) the port of destination at which the cargo is to be delivered. The arguments for each of these meanings were presented to your Lordships and it may at some time and in some case be necessary to answer them but I am not persuaded that in the present case an answer to them as presented is required.

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(45) 1 W. Rob. 174.

(46) 3 W. Rob. 138.

If a vessel is in danger as defined by Dr. Lushington in *The Charlotte* (47), and salvage services are offered, the master must make up his mind whether to accept them or not. In so doing he must, of course, act like a prudent master, but considerable latitude ought to be allowed him, more particularly in a case such as the present, where the ship is carrying a general cargo and it is therefore a difficult task involving much delay to communicate with the various owners. He is responsible for ship and cargo and the danger of failing to accept salvage services or of dispensing with them at too early a period is well illustrated by the case of *The Germania* (48).

Of course, if no salvage award is permissible when once the damaged vessel has reached some place where she can lie for an indefinite period in physical safety but from which no method of egress has been shown to exist and where, unless some means of further progress is obtained, the ship must lie deteriorating and the cargo ultimately perishing, cadit quæstio. But I do not accept that view. The master whose ship has suffered damage must do his best to preserve the ship and cargo and to bring both to their destination as cheaply and efficiently as possible. The possibility of expense and the effect of delay both upon the ship and cargo must be borne in mind. And it has to be remembered that the master, manager or owner of the ship has a difficult task in assessing what will be best for the various interests. If it is clearly to the advantage of his cargo he ought to tranship and arrange for it to be carried on by another ship. The possibility of repair at convenient ports and the time involved and safety of the operation to ship and cargo must be borne in mind. The answer, in my view, is not the simple one—"Is the ship in a "position of physical safety?".

(47) 3 W. Rob. 68, 71.

(48) [1904] P. 131.

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I do not think that the only possibilities are to be found in the answer to one of two alternatives, viz., (1.) May the master of a damaged ship which is taken in tow in a damaged condition from a position of potential danger treat the towage to his destined port as salvage services? or (2.) Is the cargo only bound to pay its proportion of salvage up to the nearest position at which the ship can lie in physical safety? On the contrary, I think that, if the considerations mentioned above are borne in mind, a third view can be loosely expressed by saying that the salvage lasts so long as the master acts reasonably for the combined benefit of ship and cargo.

Some further support for this view is to be obtained from a number of cases decided in the Court of Admiralty. In *The Idomeneus* (49), Bateson, J., says, in a case where the damaged ship was towed first to Port Sudan and then to Suez, and where it was argued that the only salvage service was the towage to Port Sudan: " It is quite true that the principal salvage was getting " the *Idomeneus* into Port Sudan to start with, but for the long " tow the *Perseus* has to be paid as a steamer rendering a service, " and it is really an ocean tow, and therefore must be properly " remunerated as salvage ".

In the case of *The Laomedon* (50), that ship was towed by two vessels in successive stages from a position to the south and east of Perim to Malta except through the Suez Canal from Suez to Port Said, when she was under the charge of tugs. The whole towage seems to have been admitted to be a salvage service and the quantum of award alone to have been in dispute, but the only excuse for proceeding to Malta appears to have been that that was the first port at which repairs could be effected and the towage was at least as much for the benefit of the cargo as that of the ship. Hill, J., says (51): " With regard to the " *Phemius* " (one of the salving ships) " I must reward them " upon the basis that they have . . . towed this very valuable " property a distance of 3,000 odd miles, and that that is salvage " and not towage, because throughout the whole time the " *Laomedon* was disabled and had no means of propulsion of her " own, and is salvage right up to Malta because that was the first " port where she could get a new propeller ".

I have already referred to *The Glaucus* (52) and need not deal further with that case.

(49) 22 Ll. L. Rep. 299, 300.
(50) 23 Ll. L. Rep. 230.
(51) Ibid. 234.
(52) 81 Ll. L. Rep. 262.

In none of these cases does the distinction appear to have been drawn between ship and cargo which it has been sought to establish in the present case. I cannot but believe that the reason why no such distinction was made was because in each case it was accepted that an award held reasonable in the case of the ship was reasonable in the case of the cargo also, unless it could be established that the master or owner had neglected its interests.

In the present case the whole of the facts and law were carefully considered by the learned President, and, unless the appellants could establish that salvage services always end where the ship can be in physical safety and where the cargo also can remain at least for some time without danger or damage, he appears to me to have reached the right conclusion upon ample and adequate grounds. He carefully considered the opportunities for repair at each port on the voyage, the risks and delay involved and the possibilities of safe towage. Amongst others, he had in mind those of dry-docking the *Troilus* without discharging her cargo and the imprudence of tipping a Liberty ship sufficiently to fit a propeller. On the last two points the Court of Appeal took the advice of their assessors, who thought that either expedient would be unsafe, and your Lordships' assessors took the same view.

In my opinion, if I may respectfully say so, the learned President has adopted the right approach to the solution of the question, and I find myself in agreement with the answer reached. This view is fortified by the judgment of the Court of Appeal, from which I differ only in that I have accepted the views of our assessors as to the physical safety of the *Troilus* at Aden without having thought it necessary to come to any definite conclusion on the point. As he took the view that the *Troilus* was in some danger at Aden, Bucknill, L.J., did not deal with the argument that the services of the *Glenogle* could not be salvage because she started them when the *Troilus* was in safety. Somervell, L.J., however, as an alternate ground for his decision, did consider the question and expressed the opinion that in the circumstances the change from *Stentor* to *Glenogle* did not affect the result. As I have said, I am of the same opinion and would dismiss the appeal with costs.

My Lords, my noble friends, LORD REID and LORD TUCKER, have asked me to express their agreement with the opinion which I have read.

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LORD NORMAND. My Lords, I have had the advantage of reading the opinion of my noble and learned friend on the Woolsack, and I agree with it.

LORD OAKSEY. My Lords, I, too, have had the advantage of reading the opinion of my noble friend on the Woolsack, and I agree with it.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co., for Batesons & Co., Liverpool; Bentleys, Stokes & Lowless, for Alsop, Stevens & Co., Liverpool.*

[HOUSE OF LORDS.]

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Apr. 3, 4. *June* 20.

HOWELL . . . . APPELLANT;

AND

FALMOUTH BOAT CONSTRUCTION CO. LD. RESPONDENTS.

Shipping—Ship repairs—Not to be carried out "except under the "authority of a licence granted by the Admiralty"—Oral permission—Assumption of authority by government officer—Whether subject protected if authority exceeded—Restriction of Repairs of Ships Order, 1940 (*St. R. & O.,* 1940, *No.* 142), *para.* 1.

In 1947 certain work was executed by ship repairers on a former naval vessel, at the order of the owner, to adapt her for passenger carrying. All the work done down to October 11 was done after inspection by, and with the oral permission of, the licensing officer for the Admiralty, who on that day signed a written licence for "the carrying out . . . of the repairs and alterations and dry-"docking of the ship as set out in the . . . form of application". The licence contained a condition that it should "automatically "determine if any unauthorized alterations or repairs are carried "out". The form of application applied for a licence "to com-"plete Board of Trade requirements for modified steam 3 certifi-"cate". Some of the work done was suitable for a passenger ship but was not within the Board of Trade "requirements", but the licensing officer knew all that was done and none of the work was unauthorized by him.

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD RADCLIFFE AND LORD TUCKER.

By para. 1 of the Restriction of Repairs of Ships Order, 1940, the Admiralty, acting under reg. 55 of the Defence (General) Regulations, 1939, required that no person whose business was the repair or alteration of ships was to carry out in the United Kingdom repairs or alterations to ships otherwise than to the order of any Department of His Majesty's Government in the United Kingdom except under the authority of a licence granted by the Admiralty. A letter sent in 1942 from the Director of Merchant Shipping Repairs at the Admiralty to all licensing officers stated: ". . . where you are dealing with reliable ship repairers and "owners with a good record you ought not to delay the putting in "hand of obvious repairs merely pending the actual issue of a "licence".

Held, that on the true construction of the Order "licence" meant "licence in writing", but, in the circumstances of this case, the licence in writing granted covered work already done under the oral sanction of the proper authority as well as work to be done in the future. In the case of work done with the oral authority of the officer authorized to grant retrospective licences but not in fact within the terms of the written licence granted, the defect, which he had the power to cure and which ought to have been cured, should be disregarded. The work was, accordingly, not illegal and the cost was recoverable from the owner of the vessel.

The fact that a government officer in his dealings with the subject may have assumed an authority, which he did not possess, to grant a licence, does not debar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it.

Decision of the Court of Appeal (sub nom. *Falmouth Boat Construction Co. Ld.* v. *Howell*) [1950] 2 K. B. 16 affirmed.

APPEAL from the Court of Appeal (Bucknill, Singleton and Denning, L.JJ.).

The facts, stated by Lord Normand, were as follows:—The action was brought by the plaintiffs (respondents) to recover the sum of 4,371*l*. 11*s*. 7*d*., the balance alleged to be due for work done and materials supplied for the repair and alteration of the defendant's (appellant's) vessel M.L.229. In his original defence and counterclaim the appellant alleged that the sum sued for was excessive and he also claimed damages for alleged failure to complete the repairs and alterations by the contract date. By an amended defence and counterclaim he raised a new issue of law, with which alone this appeal was concerned. He alleged that until October 11, 1947, the respondents had no written licence from the Admiralty authorizing them to carry out the alterations and repairs and that so much of the claim as related to alterations and repairs carried out before that date was illegal and irrecoverable by virtue of the Restriction of Repairs of Ships Order, 1940,

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made under reg. 55 of the Defence Regulations, 1939. He also pleaded that although a written licence was granted by the Admiralty on October 11, 1947, it was a condition of the licence that it should automatically determine if any work not authorized by it was done, and that the respondents in fact carried out unauthorized work on the vessel after October 11, 1947, with the consequence that the licence was determined and that so much of the claim as related to repairs and alterations carried out after October 11, 1947, was illegal and irrecoverable. The Official Referee, Sir Tom Eastham, K.C., dealt with the questions raised by the amended defence as a preliminary issue and after hearing evidence he, in effect, sustained the defence and rejected the respondents' claim except certain charges about which he desired to have further information before deciding whether a licence was needed for them. The Court of Appeal reversed the decision of the Official Referee. The appellant appealed to the House of Lords.

Regulation 55 (1.) of the Defence (General) Regulations, 1939, empowered the competent authority, inter alia, to provide by Order " for regulating or prohibiting the . . . use . . . of articles " of any description " and for incidental and supplementary matters. " An Order made under this regulation may prohibit " the doing of anything regulated by the Order except under the " authority of a licence granted by such authority or person as " may be specified in the Order ". Under this regulation an Order was made by the Board of Trade, called the Restriction of Repairs of Ships Order, 1939 (St. R. & O., 1939, No. 1086), dated September 4, 1939, but the responsibility for dealing with ships' repairs was subsequently transferred to the Minister of Shipping and, still later, from him to the Admiralty. The Order of 1939 was accordingly superseded by an Order by the Admiralty of January 31, 1940, the Restriction of Repairs of Ships Order, 1940 (St. R. & O., 1940, No. 142), substituting the Admiralty for the Board of Trade but not otherwise altering the substance of the earlier Order. The Order of 1940 provides by para. 1 that: " No person whose business . . . is the repair alteration or dry-" docking of ships shall carry out or cause or permit to be carried " out in the United Kingdom repairs or alterations to or the dry-" docking of ships otherwise than to the order of any Department " of His Majesty's Government in the United Kingdom except " under the authority of a licence granted by the Admiralty ". This Order was revoked by the Restriction of Repairs of Ships Revocation Order (St. R. & O., 1949, No. 1766), which came into operation on October 1, 1949. The Minister of Shipping on November 17, 1939, authorized surveyors of ships appointed under s. 724 of the Merchant Shipping Act, 1894, to sign on his behalf any licence under any Order restricting repairs of ships, and the Admiralty on April 26, 1941, granted them the same authority. On June 22, 1942, the Director of Merchant Shipping Repairs at the Admiralty sent a letter to all licensing officers giving them directions upon the policy they were to follow. It contained the following paragraph for their guidance in dealing with applications for licences to execute repairs: "I understand "that it has been made clear to you that when you are dealing "with reliable ship repairers and owners with a good record you "ought not to delay the putting in hand of obvious repairs merely "pending the actual issue of a licence". This letter was of administrative effect only and had not the authority of an order made under the Defence Regulations.

The appellant's contract for the repair and alteration of M.L. 229 was originally made in December, 1946, with Boat Construction Co. Ld. The alterations contemplated were to render the vessel suitable for use, in conformity with Board of Trade requirements, as a passenger carrying vessel. The repairs and alterations were to be carried out and so far as completed were carried out at Falmouth where John Williamson Thompson was the Board of Trade surveyor and the licensing officer for the purpose of the Order. The managing director of Boat Construction Co. Ld., after informing the appellant that a licence would be required, wrote to the licensing officer on February 3, 1947, applying for a licence. In his application he detailed the repairs proposed in these terms: "Remove existing petrol engines and "fit two Diesel engines. Carry out necessary repairs and altera-"tions to comply with Board of Trade requirements for St. 3 "Certificate, for 150 passengers". The licensing officer refused to grant a licence at that time because, as he explained, he was short of timber. But he orally authorized them to carry out the work in so far as it did not require materials. The respondents were incorporated on March 15, 1947, before the work was begun, and thereafter took over, with the appellant's consent, the contract for the repair and alteration of his vessel. Work began in May, 1947, with the licensing officer's knowledge and permission and he or his assistant thereafter frequently and regularly inspected its progress and gave directions how it should be carried on. In October, 1947, the respondents needed to obtain timber for the work and on October 7 sent to the licensing officer a written form of application for a licence "to complete B.O.T. "requirements for modified steam 3 certificate". The estimated cost was stated in the application at 2,500*l*. On October 11, 1947, a licence was granted for "the carrying out . . . of the "repairs and alterations and dry-docking of the ship as set out "in the . . . form of application". This licence was subject to the condition that it should "automatically determine if any "unauthorized repairs, alterations or dry-docking are carried "out". Thereafter the respondents carried out further work under the licensing officer's directions, and some of that work, in particular a cocktail bar, was suitable for a passenger ship but was not within the Board of Trade "requirements". The licensing officer knew all that was done and he deponed that no unauthorized work was carried out. He also said that the licence of October 11, 1947, was the only licence granted by him, that in his view it had retrospective effect, and that it was not limited to repairs of the value of 2,500*l*.

Havers, K.C., and *Claude Duveen* for the appellant (defendant). In the Restriction of Repairs of Ships Order, 1940, the word "licence" means only a licence in writing, and there is no power to grant an oral licence. The Order was made under reg. 55 (1.) of the Defence (General) Regulations, 1939. In the regulations an intention to indicate an informal consent which might be oral is expressed by words like "permission" or "leave". Otherwise such expressions are used as "the "authority of a permit" (reg. 9 (1.)) or "the authority of a "licence" (reg. 46 (1.), (2.)). See also regs. 55G (1.), 68 (2.), 87 (1.) and 88 (1.). In reg. 8 (1.) there is the expression "written "permit". For examples of the more informal meaning see regs. 2, 12 (1.), 18 (1.) and 21 (1.). By reg. 100 (6.) the Interpretation Act, 1889, is made to apply to the interpretation of these regulations, and in accordance with s. 31 of the Act the word "licence" must have the same meaning in the Order as in the regulations and in the Emergency Powers (Defence) Act, 1939. The point raised by Denning, L.J., that the court should presume that the Order of 1940 had been varied so as to allow oral permission to be given was never argued in the Court of Appeal. In fact there never was any such varying Order: see Restriction of Ships Revocation Order, 1949. *Jackson, Stansfield & Sons* v. *Butterworth* (1) was rightly decided, and the licence granted can have no retrospective effect: see also *Bostel*

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(1) (1948) 64 T. L. R. 481, 484.

Brothers Ld. v. *Hurlock* (2) and *J. Dennis & Co. Ld.* v. *Munn* (3). Moreover, the licence does not cover all the work orally authorized. It therefore automatically determines.

Denning, L.J., was also in the plaintiff company's favour on the estoppel point, applying the principle of *Robertson* v. *Minister of Pensions* (4). But this doctrine can have no application to the present case where it is argued that the defendant is precluded on the ground of estoppel or quasi-estoppel from saying that an action which is prohibited by statutory authority is invalid. Estoppel cannot validate such an act nor can it enable a person to do a thing which he is legally disabled from doing: see Halsbury's Laws of England (2nd ed.), Vol. XIII, p. 402, para. 455; p. 474, para. 542. See also *Bradshaw* v. *M'Mullan* (5); *In re a Bankruptcy Notice* (*No.* 62 *of* 1924) (6); *Griffiths* v. *Davies* (7); *In re Mahmoud and Ispahani's Arbitration* (8); and *Maritime Electric Co. Ld.* v. *General Dairies Ld.* (9)..

E. Ryder Richardson and *S. H. Noakes* for the respondents (plaintiffs). The facts disclose no breach by the respondents of the provisions of the Order of 1940 on its true construction. The licence under it need not be in writing. Where the Defence Regulations require a written document they say so: "written "permit" (reg. 8 (1.)) and "written notice" (reg. 22). At the best the defendant can only show an ambiguity. *Jackson, Stansfield & Sons* v. *Butterworth* (10) is a decision on a different regulation: see Control of Building Operations Order, 1941, and reg. 56A and Sch. VI of the Defence (General) Regulations, 1939. Anything but a boat propelled only by oars comes within the Order of 1940, which covers a ship however small. If the defendant were right a written licence would be required every time a nail was driven into a ship, but the plaintiffs are arguing for a common-sense construction of the Order. Since the licensing officer can give a written licence he can also give an oral licence: the greater includes the less, just as an authority to sign a written contract includes authority to enter into an oral contract. An oral licence is not, therefore, illegal.

Even assuming that the licence must be in writing, under the Order of 1940 it may be in the most general terms; it need not refer to any specified ship, work or amount. The Admiralty might grant a general licence to X to do work on ships to any value so long as he had the sanction of the licensing officer; that would be a licence under which work could lawfully be done.

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(2) [1949] 1 K. B. 74, 79, 83.
(3) [1949] 2 K. B. 327.
(4) [1949] 1 K. B. 227.
(5) [1920] 2 I. R. 412, 424–5.
(6) [1924] 2 Ch. 76.
(7) [1943] K. B. 618.
(8) [1921] 2 K. B. 716, 732.
(9) [1937] A. C. 610.
(10) 64 T. L. R. 481.

The written licence in this case came into being for the purpose of supplying a licence number, so that the plaintiffs, in applying for materials, could produce the licence as evidence that permission had been given for the whole work, whether done before its date or to be done after. The licence was retrospective in effect; the granting of a retrospective authority is a familiar conception in law. The licensing officer considered that he had authorized all the work. It is argued for the defendant that the words used in the licence do not cover all the work authorized orally and that therefore the licence automatically terminates and the respondents cannot succeed in their claim. But since a licence under the Order can be retrospective any defect can be made good at any time. In criminal proceedings it would be impossible to convict the respondents on a charge relating to this work.

As to the opinion of Denning, L.J., on the effect of the assumption of authority by a government officer (11), it is sound and should be upheld. Everything he says depends on the fact that such officers are given much authority by Orders "not "available to the public", legislation which is in effect secret. There should be grafted onto the maxim that ignorance of the law is not an excuse a proviso that it is not to apply in the case of sub-delegated legislation which the public does not know and cannot be expected to know: see *Blackpool Corporation* v. *Locker* (12) and *Maritime Electric Co. Ld.* v. *General Dairies Ld.* (13).

Havers, K.C., replied.

Their Lordships took time for consideration.

June 20. LORD SIMONDS. My Lords, I have had the privilege of reading the opinion of my noble and learned friend Lord Normand, which is about to be read, and I propose only to make some observations on the law applicable to the facts as stated by him.

The substantial question is whether the plea raised by the appellant, that the work, in respect of which the respondents' claim was made, was illegal in that they had no licence from the

(11) [1950] 2 K. B. 16, 25–6.
(12) [1948] 1 K. B. 349, 369.
(13) [1937] A. C. 610, 620.

Admiralty to carry it out, is a valid plea. The plea is founded on the general proposition that "what is done in contravention "of the provisions of an Act of Parliament cannot be made the "subject-matter of action". These are the words used by Lord Ellenborough, C.J., in *Langton* v. *Hughes* (14), and they have been cited with approval by the highest authority. I have no doubt that they are equally applicable to what is done in contravention of a regulation lawfully made under the authority of an Act of Parliament and to an Order lawfully made under the authority of such a regulation. That which is prohibited cannot lawfully be done whether the prohibition is contained in Act or Regulation or Order, and if it cannot lawfully be done it cannot be the subject of a claim enforceable at law.

How then is this plea met by the respondents? They say in the first place that the assumption of illegality is not well founded and that the appellant is wrong in his contention that on the true construction of the relevant Act, Regulation and Order it was necessary that a licence in writing should be granted by the competent authority before they began or completed the work. This question I will examine later, for I would first deal with the reasons why in the opinion of Denning, L.J., the plea fails. The learned Lord Justice gave two reasons. He was prepared to assume that the original Order of 1940 postulated a licence in writing but nevertheless thought that in the circumstances the court should presume (applying the maxim omnia praesumuntur rite esse acta), that it had been varied so as to enable oral permission to be given. Your Lordships were told that this contention had not been debated at the Bar and that the appellant's counsel had no opportunity of dealing with it. He was able, given the opportunity, to satisfy the House that no such varying Order had in fact been made, citing in particular the Restriction of Repairs of Ships Revocation Order, 1949 (St. R. & O., 1949, No. 1766), which would in its terms be inconsistent with such an Order. In the circumstances the respondents' counsel did not rely on this reason.

The second reason given by the learned Lord Justice was based upon the same assumption as the first and upon the further assumption that a varying Order ought not to be presumed. He described the principle that he invoked as of particular importance in these days when the officers of government departments are given much authority by Orders and circulars which are not available to the public. I will state this principle in his own words (15): "Whenever government officers, in their dealings "with a subject, take on themselves to assume authority in a "matter with which he is concerned, the subject is entitled to "rely on their having the authority which they assume. He "does not know and cannot be expected to know the limits of "their authority, and he ought not to suffer if they exceed it. "That was the principle which I applied in *Robertson* v. "*Minister of Pensions* (16), and it is applicable in this case "also". My Lords, I know of no such principle in our law nor was any authority for it cited. The illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy. I do not doubt that in criminal proceedings it would be a material factor that the actor had been thus misled if knowledge was a necessary element of the offence, and in any case it would have a bearing on the sentence to be imposed. But that is not the question. The question is whether the character of an act done in face of a statutory prohibition is affected by the fact that it has been induced by a misleading assumption of authority. In my opinion the answer is clearly No. Such an answer may make more difficult the task of the citizen who is anxious to walk in the narrow way, but that does not justify a different answer being given.

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(14) 1 M. & S. 593, 596.

I am therefore of opinion that the order of the Court of Appeal cannot be sustained for the reasons given by Denning, L.J., but I am nevertheless of opinion that this appeal should be dismissed for the reasons to be given by the noble and learned Lord who follows me, with which I am in full agreement, and I will add only a few words.

I have come to the conclusion that on the true construction of the relevant order the word "licence" means "licence in "writing". If, having given the matter the best consideration I could, I remained in doubt, I should think it proper to apply to this case also the principle applied in *London & North Eastern Railway Co.* v. *Berriman* (17). In that case Lord Porter reasserted the rule (I use his own words (18)) that "where a "statute imposes a penalty . . . and the obligation in respect of "which the penalty is imposed is expressed in ambiguous terms, "the more lenient construction of the section should be adopted "so that the penalty may not be incurred in a doubtful case".

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(15) [1950] 2 K. B. 16, 26.
(16) [1949] 1 K. B. 227.
(17) [1946] A. C. 278.
(18) Ibid. 308.

Lord Macmillan said (19) that " where penalties for infringement " are imposed it is not legitimate to stretch the language of a " rule, however beneficent its intention, beyond the fair and " ordinary meaning of its language ". I ventured to sum up the rule in the phrase (20) that " a man is not to be put in peril " upon an ambiguity ". I regard it as of particular importance that this rule should be observed, whether the statutory prescription refers to the invasion of copyright or to the system of working in a factory or (as here) to the repair of ships in a shipyard. Perhaps it is of peculiar importance where the prescription is contained not in Acts of Parliament or even in Regulations but in Orders which are not easily accessible to the public. But in order that this principle may be invoked there must be an ambiguity, and, as I have said, though I have felt the force of the argument to the contrary, I have come to the clear conclusion that the licence which the Order postulates is a licence in writing.

But that does not conclude the matter. For I see no reason why in the circumstances of this case the licence in writing should not cover work already done under the oral sanction of the proper authority as well as work to be done in the future. Upon this part of the case I do not wish to add anything to what my noble and learned friend will say. In my opinion the appeal should be dismissed with costs.

LORD NORMAND. My Lords, in the Court of Appeal Bucknill, L.J., and Singleton, L.J., held that a licence under the Order of 1940 might competently be an oral permission and that it need not be in writing. If that is the true meaning of the Order there is no shadow of doubt that all the work done by the respondents was licensed by Mr. Thompson. Even if it is left in doubt whether the licence must be in writing, the doubt should, especially in a penal Order, be resolved in a sense favourable to the freedom of the subject. But I find no ambiguity and I feel myself constrained to differ from Bucknill and Singleton, L.JJ. In the Emergency Powers (Defence) Act, 1939, s. 2, sub-s. 5 (*a*), " any licence " is referred to along with " permit, certificate or " other document ", and the necessary implication is that a licence within the meaning of this section of the Act is a written document, and it should follow that the word is used with the same meaning in Orders made under the Act. It is further true that in legislation generally " licence " is the word used for a written authorization, and that it has come to have the significance of a written document unless there is something to indicate that it may include an oral authorization. In the Defence Regulations of 1939 I think that when " licence " is used it bears the meaning " written licence " and excludes oral licence. That appears most clearly in reg. 87 where it is associated with " certificate or written permission ", and in reg. 88, where " licence . . . or other document " is mentioned. On the other hand, words like " permission " and " leave " are used where the authority may be expressed either orally or in writing. These considerations seem to me to lead to the conclusion that a licence under reg. 55 must be a written licence.

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(19) [1946] A. C. 278, 295.

(20) Ibid. 313–4.

The next question is whether a licence under the Order can be retrospective. This, again, is a question of construction. Counsel for the respondents naturally took the point that retrospective authority is a familiar conception in our law. That is true and not unimportant for this case. But it needs more than this to justify the construing of a licence to carry on an activity otherwise prohibited by statutory order as including a licence with retrospective effect. It would be a dangerous power to place in the hands of Ministers and their subordinate officials to allow them, whenever they had power to license, to grant the licence ex post facto; and a statutory power to license should not be construed as a power to authorize or ratify what has been done unless the special terms of the statutory provisions clearly warrant the construction. There are, however, in my opinion, sufficient indications that reg. 55 is a warrant for an Order making provision for licences having retrospective effect. The terms of reg. 55 and the terms of reg. 56A (inserted by St. R. & O., 1941, No. 1596) present a somewhat peculiar contrast. Both these regulations are concerned with repair work which may be of the highest urgency in the crises of war, reg. 55, as we have seen, dealing with the repair of ships and reg. 56A with the repair of buildings. Regulation 56A differs from reg. 55 in two important particulars. Under it repairs cannot be carried on unless there is a licence " in force " which authorizes them. That plainly excludes a licence with retrospective effect. But, then, in order to avoid the possibly disastrous delays which might take place if no work could be done on, for example, a bomb-damaged building till a written licence was obtained, the regulation provides a defence if the acts done without authorization or licence were urgently necessary and were done in circumstances of emergency which rendered it impracticable to obtain an authorization or

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licence. It is difficult to resist the inference that the defence of emergency or some equivalent provision was not inserted in reg. 55 or in the Orders made under it because it was contemplated that repairs of ships might be undertaken under official supervision subject to a licence to be afterwards granted. A decision in this case that the licence might be retrospective is in no way inconsistent with the contrary decision upon the effect of reg. 56A in *Jackson, Stansfield & Sons* v. *Butterworth* (21). That brings me to the question whether the licence of October 11, 1947, is retrospective in its effect so as to cover the work done previously. It is not a legal document; it is elliptically expressed and some freedom of construction is justified. It is a licence to complete work begun, and I think that the reasonable construction is that work already done was impliedly covered. There is more difficulty about the cocktail bar, which I shall assume was not within the terms of the application, and, therefore, not within the terms of the written licence. I think, however, that when the officer authorized to grant licences with retrospective effect comes forward to depone that all the work done in fact had his authority, any defect in the licence which he had power to cure and which ought to have been cured should be disregarded. In such a case, too, I would decline to apply the rule that money cannot be recovered for services given or materials supplied in breach of a statutory prohibition. To do so would be to stretch the precedents beyond reason and to pass from reality into formalism and make-believe.

It would not be respectful to the judgment of Denning, L.J., to part from the case without referring to the grounds on which he decided in favour of the respondents. The learned Lord Justice did not decide whether a licence made under the Order had to be in writing, nor whether it might be of retrospective effect. He assumed that on a true construction of the Order the licence must be a written licence granted before any repair work was begun, and that without such a licence the repairers would have been prohibited by the Order of 1940 (St. R. & O., 1940, No. 142) from performing any work upon the vessel. "Nevertheless", he said (22), "it could be varied without any "formality or publicity", and the court should presume from the terms of the letter of June 22, 1942, above referred to, that it had been so varied as to enable oral permission to be given instead of a written licence. With the utmost respect I cannot assent to the argument. There is no ground for thinking that a copy of an Order modifying the Order of 1940 would have been any more difficult to obtain than the copy of the Order of 1940 itself. Such evidence as there is appears to demonstrate that the Order of 1940 was the only order in force till it was revoked by the Order of 1949. If there had been another Order in force it also would have been revoked. Mr. Thompson's evidence, I think, implies that the Order of 1940, requiring a written licence, was in force during the execution of the repairs. The appellant in his pleadings expressly relied on that Order as the only order in force and there was no repudiation of this in the respondents' pleadings. It is not for the court to presume the existence of Orders which are neither pleaded nor proved.

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(21) (1948) 64 T. L. R. 481; [1948] 2 All E. R. 558.

(22) [1950] 2 K. B. 16, 25.

The other ground on which the learned Lord Justice proceeded is that (23) " whenever government officers, in their dealings with " a subject, take on themselves to assume authority in a matter " with which he is concerned, the subject is entitled to rely on " their having the authority which they assume. He does not " know and cannot be expected to know the limits of their " authority, and he ought not to suffer if they exceed it ". As I understand this statement, the respondents were, in the opinion of the learned Lord Justice, entitled to say that the Crown was barred by representations made by Mr. Thompson and acted on by them from alleging against them a breach of the statutory Order, and further that the respondents were equally entitled to say in a question with the appellant that there had been no breach. But it is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it. It is therefore with regret that I feel unable to accept a short way to a decision which avoids the necessity of construing the Order of 1940 and of arriving at the meaning of the word " licence ".

Nevertheless, for the reasons I have given I would dismiss the appeal.

LORD OAKSEY. My Lords, I agree with the opinions expressed by the noble Lord on the woolsack and by my noble friend Lord Normand, and I only desire to add that I agree also with the rule of interpretation summed up by the noble Lord on the woolsack in the phrase that a man should not be put in peril on an

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(23) [1950] 2 K. B. 16, 26.

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ambiguity. This rule appears to me to be in accord with the fundamental principle of the criminal law that a man ought not to be convicted of an offence unless it is proved beyond any reasonable doubt that he committed that offence.

LORD RADCLIFFE. My Lords, I have had the advantage of reading in advance the opinions which have been delivered by my noble and learned friends Lord Simonds and Lord Normand. I am in full agreement with all that they have said both as to the facts of this case and as to the only principles of law which can properly be brought to bear upon them. I do not think it necessary to add anything except that I agree that the appeal should be dismissed.

LORD TUCKER. My Lords, I concur.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.; Layton & Co.*

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Mar. 5, 6;
May 10.

[HOUSE OF LORDS.]

BOLTON AND OTHERS . . . . . APPELLANTS;

AND

STONE . . . . RESPONDENT.

Negligence—Nuisance—Personal injuries—Cricket club ground—Ball hit into highway—Pedestrian on highway injured—Liability.

A person, being on a side road of residential houses, was injured by a ball hit by a player on a cricket ground abutting on that highway. The ground was enclosed on that side by a seven-feet fence, the top of which, owing to a slope, stood seventeen feet above the level of the pitch. The wicket from which the ball was hit was about seventy-eight yards from this fence and 100 yards from the place where the injury occurred. There was evidence that while over a period of years balls had been struck over the fence on very rare occasions, the hit now in question was altogether exceptional.

Held, that the members of the club were not liable in damages to the injured person, whether on the ground of negligence or nuisance.

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* *Present:* LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD REID AND LORD RADCLIFFE.

Although the possibility of the ball being hit on to the highway might reasonably have been foreseen, this was not sufficient to establish negligence, since the risk of injury to anyone in such a place was so remote that a reasonable person would not have anticipated it.

Decision of the Court of Appeal (sub nom. *Stone* v. *Bolton*) [1950] 1 K. B. 201, reversed.

Appeal from the Court of Appeal (Singleton and Jenkins, L.JJ., Somervell, L.J., dissenting).

The facts, as stated by Lord Porter, were as follows:—On August 9, 1947, Miss Stone, the plaintiff, was injured by a cricket ball while standing on the highway outside her house, No. 10 Beckenham Road, Cheetham Hill, Manchester. The ball was hit by a batsman playing in a match on the Cheetham Cricket Ground which was adjacent to the highway. She brought an action for damages against the committee and members of the club. The striker of the ball, a member of a visiting team, was not a defendant.

The club had been in existence, and matches regularly played on this ground, since about 1864. Beckenham Road was constructed and built up in 1910. For the purpose of its lay-out, the builder made an arrangement with the club that a small strip of ground at the Beckenham Road end should be exchanged for a strip at the other end. The match pitches had always been, and still were, kept along a line opposite the pavilion, which was the mid-line of the original ground. The effect was that for a straight drive—the hit in the case in question—Beckenham Road had for some years been a few yards nearer the batsman than the opposite end. The cricket field, at the point at which the ball left it, was protected by a fence seven feet high but the upward slope of the ground was such that the top of the fence was some seventeen feet above the cricket pitch. The distance from the striker to the fence was about seventy-eight yards, not ninety yards as Oliver, J., stated, and to the place where the plaintiff was hit just under 100 yards.

Beckenham Road was an ordinary side-road giving access to private houses. It followed the western half of the northern edge of the ground, with houses on the far side only, and then, approximately opposite the line of the wickets, turned north-eastwards with houses thereafter on both sides of the highway. The plaintiff's house was the second after the house in the angle of the turn. Opposite there was a row of six houses, No. 11, occupied by one Brownson, standing nearest the ground, with its side towards the northern boundary, and being substantially closer to it than the spot where the plaintiff was injured.

Brownson, giving evidence, said that five or six times during the last few years he had known balls hit his house or come into the yard. His evidence was vague as to the number of occasions. Members of the club of twenty years' standing or more agreed, in evidence, that the hit was altogether exceptional in comparison with anything previously seen on that ground. They also said (and Oliver, J., accepted their evidence) that it was only very rarely indeed that a ball was hit over the fence during a match. A club member of thirty-three years' standing said that he knew of no complaints of balls being hit into the road. Another member estimated that balls had been hit into that road about six times in twenty-eight years, but said that there had been no previous accident, so far as he knew.

The plaintiff claimed damages in respect of injuries said to be caused by the defendants' negligence or as the result of a nuisance for which they were responsible. The particulars of negligence were that they "(A) pitched the cricket pitch too near to the "said road; (B) failed to erect a . . . fence . . . of sufficient "height to prevent balls being struck into the said road; "(C) failed to ensure that cricket balls would not be hit into the "said road".

On the facts found by him Oliver, J., acquitted the defendants of negligence and held that nuisance was not established. The Court of Appeal, reversing this decision, held that a public nuisance was not established but that the defendants were guilty of negligence and were liable in damages. The defendants appealed to the House of Lords.

Sir Walter Monckton, *K.C.*, and *Sime* for the appellants (defendants). The question is whether what the defendants should have foreseen and guarded against was not a bare possibility, but a reasonable probability. The chance of a ball hitting a person on the highway was not a fantastically remote possibility but it was improbable.

The defendants were not negligent. On the point of negligence the questions involved were: What standard of duty is owed by the occupiers of a ground on which a lawful game is played to persons using an adjacent highway? Were the defendants in breach of that duty? If so, was the injury caused by that breach? As to the duty owed, the degree of care demanded varies with the risk involved: see *Glasgow Corporation* v.

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Muir (1) and *Read* v. *J. Lyons & Co. Ld.* (2). Every person using the highway must, as a social animal, accept some risk from the lawful occupations of others. Healthy recreation for young men should be encouraged even at some slight risk. The standard of care required in each case must be infinitely variable to meet all cases, and it should not be put too high. There is a different degree of probability of injury in the case of cricket played near a highway and in the case of golf. In the case of cricket it cannot depend on a general universal rule. It must depend on the degree of traffic in the vicinity and on the locality. What might be foreseen as a probability in one case might only be a remote risk in another. It is a duty to guard against the ball being constantly hit out of the ground or against its being hit out of the ground by an ordinary stroke, but it is not necessary to provide against an extraordinary or exceptional stroke: see *Fardon* v. *Harcourt-Rivington* (3).

The hitting of the ball out of the ground did not constitute an actionable nuisance. The isolated hitting of a ball into the highway cannot amount to that. It is the continuance of the state of affairs that constitutes a nuisance: see Halsbury's Laws of England (2nd ed.), Vol. XXIV, p. 22, para. 38. The case is distinguishable from *Castle* v. *St. Augustine's Links Ld.* (4) on the facts. The first golf ball that fell on the highway would not have constituted a nuisance: see also *Slater* v. *Worthington's Cash Stores* (1930) *Ld.* (5). Cricket has been played on this ground for almost ninety years, and never before has anyone been injured.

Nelson, K.C., Henry Burton and *Francis Clark* for the respondent (plaintiff). In effect the defendants contend that they are entitled to hit ball after ball out of the ground provided they hurt no one. That cannot be sound. When the boundary was altered in 1910 it was the duty of the committee of the club to consider whether in all the circumstances (including the fact that a highway was now being placed alongside the ground) their arrangements provided reasonable safety for persons on the highway who are entitled to more protection than persons in private fields or gardens. Balls are not hit out of the ground accidentally. Players are encouraged to do so by being awarded six runs. If a bus driver had been hit by this ball there might have been a

(1) [1943] A. C. 448, 456–7.
(2) [1947] A. C. 156, 173.
(3) (1932) 146 L. T. 391, 392.
(4) (1922) 38 T. L. R. 615.
(5) [1941] 1 K. B. 488, 491.

very serious accident. Once one hits a ball onto the highway one must be prepared to compensate anyone hit.

The defendants were negligent in failing to take sufficient precautions to prevent the escape of cricket balls from the ground and the consequent injury of the plaintiff. The fact that even one ball had been driven out of the ground before was enough to give them warning that one might land in the road and that it was likely to cause injury to anyone standing there. Longer hits than the one in question have been known in cricket. Either the pitch should have been moved further away from the northern boundary or the fence should have been raised.

The playing of cricket on the ground in the circumstances constituted a nuisance. All cases where something dangerous is discharged onto a highway constitute a nuisance, even if only one thing be so discharged (e.g., the discharge of a missile from premises adjoining a highway): see Pratt and Mackenzie on Highways (18th ed.), pp. 107, 119; Salmond on Torts (10th ed.), p. 219; *Midwood & Co. Ld.* v. *Manchester Corporation* (6); *Fritz* v. *Hobson* (7); *Rex* v. *Moore* (8); *Bamford* v. *Turnley* (9); *Slater* v. *Worthington's Cash Stores* (1930) *Ld.* (10); and *Brown* v. *Eastern and Midlands Railway Co.* (11). *Dollman* v. *A. & S. Hillman Ld.* (12) supports the plaintiff on the point of nuisance. In the circumstances of that case the defendants would have been liable although no " state of affairs existed ". It was a case of one isolated instance of a piece of fat on the pavement. It constituted a nuisance, just as an isolated bullet or an isolated ball may constitute a nuisance.

The defendants argue that in the present case they are not liable because there is no " state of affairs ". On that argument, if the ball had not hit the plaintiff but had lain in the road where she trod on it and was thereby injured they would have been liable. As to the cases of *Noble* v. *Harrison* (13) and *Caminer* v. *Northern and London Investment Trust Ld.* (14) there is a great difference between trees growing naturally on land and rifle ranges and cricket or archery clubs. *Banister* v. *Bigge* (15) tells against the defendants' contention that the fact that no one has yet been injured is an answer to the plaintiff's claim. Since people are always passing along the highway there is always a

(6) [1905] 2 K. B. 597.
(7) (1880) 14 Ch. D. 542, 554.
(8) (1832) 3 B. & Ad. 184.
(9) (1860) 3 B. & S. 62.
(10) [1941] 1 K. B. 488.
(11) (1889) 22 Q. B. D. 391.
(12) [1941] 1 All E. R. 355.
(13) [1926] 2 K. B. 332.
(14) Ante, 88.
(15) (1865) 34 Beav. 287.

risk of someone being injured. There is an interference with the safety of the plaintiff normally using the highway. In order to constitute a nuisance that interference need not amount to a "state of affairs"; one isolated act is enough. Alternatively, if a "state of affairs" be essential, it existed here as much as in *Castle* v. *St. Augustine's Links Ld.* (16) inasmuch as the ground was laid out for cricket and it was known that balls came over the fence.

Henry Burton following. The judge made no express finding that this was an exceptional hit. If even one ball went over there arose a duty of care to insure that no one was injured in the future. When one is considering the safety of a system of work in a factory the cost of the precautions is a relevant factor. But this accident was very easy to avoid. If the wickets had been placed in the centre of the field equidistant from the north and south boundary edges it could not then have been said that the defendants had taken no precautions against a foreseeable danger. The ball would not then have been hit onto the highway and the accident would not have occurred.

Further, the defendants brought onto their land an object, viz., a cricket ball to be hit in the course of the game, and that ball escaped and caused mischief for the damage from which they are absolutely liable: see *Rylands* v. *Fletcher* (17). In this connexion there are six questions to be answered: (a) Was the ball brought onto the land by the defendants? (This is not in issue.) (b) Did it escape? Yes: see *Read* v. *J. Lyons & Co. Ld.* (18). (c) In the ordinary course if the ball escaped was it likely to do mischief? Yes: *per* Jenkins, L.J., in the Court of Appeal (19). (d) Was the damage suffered a natural result of the escape? Yes. (This is a corollary to the answer to (c).) (e) Is playing cricket a natural user of land? No. (f) Can the rule apply to a claim for personal injury as distinct from damage to property? Yes.

As to the question whether playing cricket is a "natural" use of land, "natural" might mean leaving the land in a state of nature or using it in a way in keeping with its surroundings. The "natural" use of land in the true sense is an extension of the principle sic utere tuo ut alienum non lædas. At its worst from the point of view of the defendants the principle is stated in *Rickards* v. *Lothian* (20), and it is to be noted that "the

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(16) 38 T. L. R. 615.

(17) (1868) L. R. 3 H. L. 330, 339–40.

(18) [1947] A. C. 156, 168.

(19) [1950] 1 K. B. 201, 210.

(20) [1913] A. C. 263, 279–80.

"general benefit of the community" does not necessarily cover everything that is socially desirable or laudable. Cricket is a special use of land bringing increased danger to others and accordingly it is not an ordinary user of land, but a special user: see also *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (21) and *Read* v. *J. Lyons & Co. Ld.* (22).

As to the question whether the rule can apply to claims in respect of personal injury, there is no exclusion of such a right and there is a substantial volume of authority indicating that such a claim does lie: see *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (23); *Miles* v. *Forest Rock Granite Co. (Leicestershire) Ld.* (24); *Shiffman* v. *Order of the Hospital of St. John of Jerusalem* (25); *Wing* v. *General Omnibus Co.* (26); and *Hale* v. *Jennings Brothers* (27), *per* Scott, L.J.

Sir Walter Monckton, K.C., in reply. It was suggested that when one ball had crossed the fence there arose in the defendants a duty of care to insure. But one is in the realm of practical life and common sense. There was evidence that this was a terrific hit and the standard of care applicable is affected by the fact that it was wholly exceptional. The suggested change in the position of the wickets was too slight to make any difference.

There is no case remotely like this in the authorities on nuisance. The circumstances in which occupiers of ground are under an absolute liability for a nuisance are (a) when they have caused it, and (b) when they have allowed it to continue with actual or imputed knowledge. It may be observed that the defendants were anxious to prevent the opposing team from hitting boundaries, and the hit was made by a visiting batsman. The man who hit the ball was not the servant or agent of the defendants, nor was he under their control. They did not cause the ball to leave the ground. There is no distinction in such a case as the present between negligence and nuisance; want of care is necessary for both.

The matter is one of degree and fact and the standard must vary in relation to the place where the occurrence happened: see *Hollywood Silver Fox Farm Ld.* v. *Emmett* (28); *City of Montreal* v. *Montreal Street Railway Co.* (29); and *Sturges* v. *Bridgman* (30). There is nothing in *Midwood & Co. Ld.* v.

(21) [1914] 3 K. B. 772.
(22) [1947] A. C. 156, 169, 176.
(23) [1914] 3 K. B. 772, 780.
(24) (1918) 34 T. L. R. 500.
(25) [1936] 1 All E. R. 557.
(26) [1909] 2 K. B. 652, 665.
(27) [1938] 1 All E. R. 579, 585.
(28) [1936] 2 K. B. 468, 474–5.
(29) [1903] A. C. 482, 489.
(30) (1879) 11 Ch. D. 852, 865.

Manchester Corporation (31) to show that a fleeting event can be treated as a nuisance. In *Fritz* v. *Hobson* (32) the nuisance established was an obstruction over a considerable period of time. *Castle* v. *St. Augustine's Links Ld.* (33), which is the nearest case to this, was determined on facts wholly distinguishable. In *Rex* v. *Moore* (34) the nuisance did not consist of firing but of bringing a lot of people to the shooting ground. In *Dollman* v. *A. & S. Hillman Ld.* (35) the piece of fat would appear to have lain on the pavement for an appreciable time. [He also referred to *Barker* v. *Herbert* (36); *Sedleigh-Denfield* v. *O'Callaghan* (37); and Halsbury's Laws of England, Vol. XXIV, p. 95, para. 170.]

Lord Porter intimated that their Lordships did not require to hear argument on the point of *Rylands* v. *Fletcher* (38).

Their Lordships took time for consideration.

May 10. LORD PORTER [after stating the facts in the terms set out above]:—My Lords, in the action and on appeal the respondent contended that the appellants were negligent or guilty of creating a nuisance in failing to take any sufficient precautions to prevent the escape of cricket balls from the ground and the consequent risk of injury to persons in Beckenham Road. In her submission it was enough that a ball had been driven into the road even once: such an event gave the appellants warning that a ball might be hit into the road, and the appellants knowing this must, as reasonable men also know that an injury was likely to be caused to anyone standing in the road or to a passer-by. The argument was however, as she said, strengthened when it was remembered that a ball had been driven over the fence from time to time even though at somewhat remote intervals. Such an event was known to the appellants to have occurred, and if they had considered the matter they ought to have envisaged the possibility of its repetition.

But the question remains: Is it enough to make an action negligent to say that its performance may possibly cause injury, or must some greater probability exist of that result ensuing in order to make those responsible for its occurrence guilty of negligence?

(31) [1905] 2 K. B. 597.
(32) 14 Ch. D. 542.
(33) 38 T. L. R. 615.
(34) 3 B. & Ad. 184.
(35) [1941] 1 All E. R. 355, 356, 357, 359.
(36) [1911] 2 K. B. 633, 635, 637.
(37) [1940] A. C. 880, 904–5.
(38) L. R. 3 H. L. 330.

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In the present case the appellants did not do the act themselves, but they are trustees of a field where cricket is played, are in control of it, and invite visiting teams to play there. They are, therefore, and are admitted to be responsible for the negligent action of those who use the field in the way intended that it should be used.

The question then arises: What degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field?

Undoubtedly they knew that the hitting of a cricket ball out of the ground was an event which might occur and, therefore, that there was a conceivable possibility that someone would be hit by it. But so extreme an obligation of care cannot be imposed in all cases. If it were, no one could safely drive a motor car since the possibility of an accident could not be overlooked and if it occurred some stranger might well be injured however careful the driver might be. It is true that the driver desires to do everything possible to avoid an accident, whereas the hitting of a ball out of the ground is an incident in the game and, indeed, one which the batsman would wish to bring about; but in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of injury being caused. In the words of Lord Thankerton in *Bourhill* v. *Young* (39) the duty is to exercise "such reasonable care as will "avoid the risk of injury to such persons as he can reasonably "foresee might be injured by failure to exercise such reasonable "care", and Lord Macmillan used words to the like effect (40). So, also, Lord Wright in *Glasgow Corporation* v. *Muir* (41) quoted the well-known words of Lord Atkin in *Donoghue* v. *Stevenson* (42): "You must take reasonable care to avoid acts "or omissions which you can reasonably foresee would be likely "to injure your neighbour". It is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken.

It must be remembered and cannot too often be repeated that there are two different standards to be applied when one is considering whether an appeal should be allowed or not. The first is whether the facts relied upon are evidence from which negligence can in law be inferred; the second, whether, if negligence can be inferred, those facts do constitute negligence. The first is a question of law upon which the judge must actually or inferentially rule; the second, a question of fact upon which the jury, if there is one, or, if not, the judge, as judge of fact, must pronounce. Both to some extent, but more particularly the latter, depend on all the attendant circumstances of the case.

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(39) [1943] A. C. 92, 98.

(40) Ibid. 104.

(41) [1943] A. C. 448, 460.

(42) [1932] A. C. 562, 580.

In the present instance the learned trial judge came to the conclusion that a reasonable man would not anticipate that injury would be likely to result to any person as a result of cricket being played in the field in question and I cannot say that that conclusion was unwarranted. In arriving at this result I have not forgotten the view entertained by Singleton, L.J. (43), that the appellants knew that balls had been hit out of the ground into the road, though on very rare occasions—I think six were proved in twenty-eight years—and it is true that a repetition might at some time be anticipated. But its happening would be a very exceptional circumstance, the road was obviously not greatly frequented and no previous accident had occurred. Nor do I think that the respondent improves her case by proving that a number of balls were hit into Mr. Brownson's garden. It is danger to persons in the road not to Mr. Brownson or his visitors which is being considered. In these circumstances I cannot say that as a matter of law the decider of fact, whether judge or jury, must have come to the conclusion that the possibility of injury should have been anticipated. I cannot accept the view that it would tend to exonerate the appellants if it were proved that they had considered the matter and decided that the risks were very small and that they need not do very much. In such a case I can imagine it being said that they entertained an altogether too optimistic outlook. They seem to me to be in a stronger position, if the risk was so small that it never even occurred to them.

Nor am I assisted by any reliance upon the doctrine of "res "ipsa loquitur". Where the circumstances giving rise to the cause of the accident are unknown that doctrine may be of great assistance, but where, as in the present case, all the facts are known, it cannot have any application. It is known exactly how the accident happened and it is unnecessary to ask whether this accident would have happened had there been no negligence; the only question is, do the facts or omissions which are known and which led up to the injury amount to negligence.

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(43) [1950] 1 K. B. 201, 207.

I may add that the suggestion that it would have been a wise precaution to move the pitch to a position equally between the north and south boundaries to my mind has little force. I do not think that it would have occurred to anyone that such an alteration would make for greater safety or that there was any danger in allowing things to remain as they were. The golf club case ✓(*Castle* v. *St. Augustine's Links Ld.* (44)) rested upon a different set of circumstances in which a succession of players driving off alongside a road might be expected from time to time to slice their ball over or along the road and, therefore, the possibility of injury to those using the highway was much greater. The quantum of danger must always be a question of degree. It is not enough that there is a remote possibility that injury may occur: the question is, would a reasonable man anticipate it? I do not think that he would, and in any case, unless an appellate body are of opinion that he clearly ought to have done so, the tribunal upon whom lies the duty of finding the facts is the proper judge of whether he would or not. I need not discuss the alternative claim based upon nuisance, since it is admitted on behalf of the respondent that in the circumstances of this case nuisance cannot be established unless negligence is proved.

My Lords, for the reasons I have given I am of opinion that the appeal should be allowed, the judgment of the learned judge in the court of first instance should be restored, and the respondent should pay the costs in your Lordships' House and in the Court of Appeal.

LORD NORMAND. My Lords, it is not questioned that the occupier of a cricket ground owes a duty of care to persons on an adjacent highway or on neighbouring property who may be in the way of balls driven out of the ground by the batsman. But it is necessary to consider the measure of the duty owed. In the Court of Appeal Jenkins, L.J., said (45) that it was "a duty to "prevent balls being hit into Beckenham Road so far as there "was any reasonably foreseeable risk of that happening". There can be no quarrel with this proposition, but one must not overlook the importance of the qualification "reasonably".

It is not the law that precautions must be taken against every peril that can be foreseen by the timorous. In *Glasgow Corporation* v. *Muir* (46) the decision turned on the standard of care, and Lord Thankerton held (47) that a person is bound to foresee only "the reasonable and probable consequences of the failure to take "care, judged by the standard of the ordinary reasonable man". He observed that the question whether a defender had failed to take the precautions which an ordinary reasonable man would take is essentially a jury question, and that it is the duty of the court to approach the question as if it were a jury and that a Court of Appeal should be slow to interfere with the conclusions of the trial judge. Lord Macmillan (48) agreed that the standard of duty was the reasonable man of ordinary intelligence and experience contemplating the reasonable and probable consequences of his acts. What ought to have been foreseen is the test accepted by Lord Wright (49), who quoted Lord Atkin's words in *Donoghue* v. *Stevenson* (50): "You must take reason-"able care to avoid acts or omissions which you can reasonably "foresee would be likely to injure your neighbour". Lord Clauson (51) stated as the test whether the person having the duty of care ought, as a reasonable person, "to have had in "contemplation that, unless some further precautions were "taken, such an unfortunate occurrence as that which in fact "took place might well be expected". It is therefore not enough for the plaintiff to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road; she must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence.

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(44) (1922) 38 T. L. R. 615.

(45) [1950] 1 K. B. 201, 210.

Among the facts found by Oliver, J., are:—(1.) that a house substantially nearer the ground than the place where the plaintiff was injured had been hit by a cricket ball driven out of the ground on certain occasions (vaguely estimated at five or six by a witness) in the previous few years; (2.) that the hit which occasioned the plaintiff's injury was altogether exceptional; and (3.) that it was very rarely indeed that a ball was hit over the fence between the road and the ground. It is perhaps not surprising that there should be differences of opinion about the defendants' liability even if the correct test is applied. The whole issue is, indeed, finely balanced. On the one side there are, as we were told, records of much longer hits by famous cricketers than the drive which caused the injury to the plaintiff and it is, of course, the object of every batsman to hit the ball over the boundary if he can. Again, the serious injury which a cricket ball might cause must not be left out of account. But on the other side the findings of fact show that the number of balls driven straight out of the ground by the players who use it in any cricket season is so small as to be almost negligible, and the probability of a ball so struck hitting anyone in Beckenham Road is very slight. The issue is thus one eminently appropriate for the decision of a jury, and Oliver, J., dealt with it as a jury would and gave his decision without elaborating his reasons. I think that the observations of Lord Thankerton in *Glasgow Corporation* v. *Muir* (52) are apposite and that it is unfortunate that the Court of Appeal should have reversed the decision.

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(46) [1943] A. C. 448.
(47) Ibid. 454.
(48) Ibid. 457.
(49) Ibid. 460.
(50) [1932] A. C. 562, 580.
(51) [1943] A. C. 448, 468.

I do not think that the change which took place in 1910, when Beckenham Road was made and a small strip next to it was taken from the ground in exchange for a strip at the other end, has much relevance. That change was made thirty-seven years before this accident, and the evidence about the infrequency of hits out of the ground is directed to the period since 1910, and is a sufficient basis for a judgment on the degree of risk and on the duty resting on the defendants. It was said by Singleton, L.J. (53), that the defendants might have escaped liability if in 1910 they had considered the matter and decided that the risks were so small that nothing need be done, but that since they did not consider it at all they must bear the consequences. I am not, with respect, disposed to agree with this reasoning. We are concerned with the practical results of deliberation, and the consequences of failing to consider the risk and of considering the risk but deciding to do nothing are the same. The precautions suggested by the plaintiff, being either the moving of the wickets a few steps further away from the Beckenham Road end or the heightening of the fencing, would have had little or no effect in averting the peril. The only practical way in which the possibility of danger could have been avoided would have been to stop playing cricket on this ground. I doubt whether that fairly comes within paragraph (c) of the particulars of negligence—"failure to ensure that cricket balls would not be hit into the "said road". That seems to point to some unspecified method of stopping balls from reaching the road while a game is in progress on the ground. But whatever view may be taken on these matters, my conclusion is that the decision of Oliver, J., should have been respected as equivalent to a verdict of a jury on a question of fact.

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(52) [1943] A. C. 448.

(53) [1950] 1 K. B. 201, 207.

I agree that the appeal should be allowed.

LORD OAKSEY. My Lords, I have come to the conclusion in this difficult case that Oliver, J.'s decision ought to be restored.

Cricket has been played for about ninety years on the ground in question and no ball has been proved to have struck anyone on the highways near the ground until the respondent was struck, nor has there been any complaint to the appellants. In such circumstances was it the duty of the appellants, who are the committee of the club, to take some special precautions other than those they did take to prevent such an accident as happened? The standard of care in the law of negligence is the standard of an ordinarily careful man, but in my opinion an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen. Many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation. The ordinarily prudent owner of a dog does not keep his dog always on a lead on a country highway for fear it may cause injury to a passing motor cyclist, nor does the ordinarily prudent pedestrian avoid the use of the highway for fear of skidding motor cars. It may very well be that after this accident the ordinarily prudent committee man of a similar cricket ground would take some further precaution, but that is not to say that he would have taken a similar precaution before the accident. The case of *Castle* v. *St. Augustine's Links Ld.* (54) is obviously distinguishable on the facts and there is nothing in the judgment to suggest that a nuisance was created by the first ball that fell on the road there in question.

There are many footpaths and highways adjacent to cricket grounds and golf courses on to which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses and by the pedestrians who use the adjacent footpaths and highways as negligible and it is not, in my opinion, actionable negligence not to take precautions to avoid such risks.

(54) (1922) 38 T. L. R. 615.

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LORD REID. My Lords, it was readily foreseeable that an accident such as befell the respondent might possibly occur during one of the appellants' cricket matches. Balls had been driven into the public road from time to time and it was obvious that, if a person happened to be where a ball fell, that person would receive injuries which might or might not be serious. On the other hand it was plain that the chance of that happening was small. The exact number of times a ball has been driven into the road is not known, but it is not proved that this has happened more than about six times in about thirty years. If I assume that it has happened on the average once in three seasons I shall be doing no injustice to the respondent's case. Then there has to be considered the chance of a person being hit by a ball falling in the road. The road appears to be an ordinary side road giving access to a number of private houses, and there is no evidence to suggest that the traffic on this road is other than what one might expect on such a road. On the whole of that part of the road where a ball could fall there would often be nobody and seldom any great number of people. It follows that the chance of a person ever being struck even in a long period of years was very small.

This case, therefore raises sharply the question what is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway. Is it that he must not carry out or permit an operation which he knows or ought to know clearly can cause such damage, however improbable that result may be, or is it that he is only bound to take into account the possibility of such damage if such damage is a likely or probable consequence of what he does or permits, or if the risk of damage is such that a reasonable man, careful of the safety of his neighbour, would regard that risk as material?

I do not know of any case where this question has had to be decided or even where it has been fully discussed. Of course there are many cases in which somewhat similar questions have arisen, but generally speaking if injury to another person from the defendants' acts is reasonably foreseeable the chance that injury will result is substantial and it does not matter in which way the duty is stated. In such cases I do not think that much assistance is to be got from analysing the language which a judge has used. More assistance is to be got from cases where judges have clearly chosen their language with care in setting out a principle, but even so, statements of the law must be read in light of the facts of the particular case. Nevertheless, making all allowances for this, I do find at least a tendency to base duty rather on the likelihood of damage to others than on its foreseeability alone.

The definition of negligence which has perhaps been most often quoted is that of Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.* (55): " Negligence is the omission to do some-" thing which a reasonable man, guided upon those considerations " which ordinarily regulate the conduct of human affairs, would " do, or doing something which a prudent and reasonable man " would not do ". I think that reasonable men do in fact take into account the degree of risk and do not act on a bare possibility as they would if the risk were more substantial.

A more recent attempt to find a basis for a man's legal duty to his neighbour is that of Lord Atkin in *Donoghue* v. *Stevenson* (56). I need not quote the whole passage: for this purpose the important part is: " You must take reasonable care to avoid " acts or omissions which you can reasonably foresee would be " likely to injure your neighbour ". Parts of Lord Atkin's statement have been criticized as being too wide, but I am not aware that it has been stated that any part of it is too narrow. Lord Atkin does not say " which you can reasonably foresee could " injure your neighbour ": he introduces the limitation " would " be likely to injure your neighbour ".

Lord Macmillan said in *Bourhill* v. *Young* (57): " The duty to " take care is the duty to avoid doing or omitting to do anything " the doing or omitting to do which may have as its reasonable " and probable consequence injury to others, and the duty is " owed to those to whom injury may reasonably and probably be " anticipated if the duty is not observed ". Lord Thankerton in *Glasgow Corporation* v. *Muir* (58), after quoting this statement, said: " In my opinion, it has long been held in Scotland that all " that a person can be held bound to foresee are the reasonable " and probable consequences of the failure to take care, judged " by the standard of the ordinary reasonable man. . . . The " court must be careful to place itself in the position of the person " charged with the duty and to consider what he or she should " have reasonably anticipated as a natural and probable conse-" quence of neglect, and not to give undue weight to the fact that " a distressing accident has happened ". The law of Scotland does not differ in this matter from the law of England.

(55) (1856) 11 Ex. 781, 784.
(56) [1932] A. C. 562, 580.
(57) [1943] A. C. 92, 104.
(58) [1943] A. C. 448, 454–5.

There are other statements which may seem to differ but which I do not think are really inconsistent with this. For example, in *Fardon* v. *Harcourt-Rivington* (59), Lord Dunedin said: "This is such an extremely unlikely event that I do not "think any reasonable man could be convicted of negligence if "he did not take into account the possibility of such an occurrence "and provide against it. . . . People must guard against "reasonable probabilities but they are not bound to guard against "fantastic possibilities". I doubt whether Lord Dunedin meant the division into reasonable probabilities and fantastic possibilities to be exhaustive, so that anything more than a fantastic possibility must be regarded as a reasonable probability. What happened in that case was that a dog left in a car broke the window and a splinter from the glass entered the plaintiff's eye. Before that had happened it might well have been described as a fantastic possibility, and Lord Dunedin did not have to consider a case nearer the borderline. I do not think it necessary to discuss other statements which may seem to be at variance with the trend of authority which I have quoted because I have not found any which is plainly inconsistent with it; and I have left out of account cases where the defendant clearly owed a duty to the plaintiff and by his negligence caused damage to the plaintiff. In such cases questions have arisen as to whether damages can only be recovered in respect of consequences which were foreseeable or were natural and probable, or whether damages can be recovered in respect of all consequences whether foreseeable or probable or not; but remoteness of damage in this sense appears to me to be a different question from that which arises in the present case.

Counsel for the respondent in this case had to put his case so high as to say that, at least as soon as one ball had been driven into the road in the ordinary course of a match, the appellants could and should have realized that that might happen again and that, if it did, someone might be injured; and that that was enough to put on the appellants a duty to take steps to prevent such an occurrence. If the true test is foreseeability alone I think that must be so. Once a ball has been driven on to a road without there being anything extraordinary to account for the fact, there is clearly a risk that another will follow, and if it does there is clearly a chance, small though it may be, that someone may be injured. On the theory that it is foreseeability alone that matters it would be irrelevant to consider how often a ball might be expected to land in the road and it would not matter whether the road was the busiest street, or the quietest country lane; the only difference between these cases is in the degree of risk.

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(59) (1932) 146 L. T. 391, 392.

It would take a good deal to make me believe that the law has departed so far from the standards which guide ordinary careful people in ordinary life. In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial. Of course there are numerous cases where special circumstances require that a higher standard shall be observed and where that is recognized by the law. But I do not think that this case comes within any such special category. It was argued that this case comes within the principle in *Rylands* v. *Fletcher* (60), but I agree with your Lordships that there is no substance in this argument. In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger.

In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. I think that this is in substance the test which Oliver, J., applied in this case. He considered whether the appellants' ground was large enough to be safe for all practical purposes and held that it was. This is a question not of law but of fact and degree. It is not an easy question and it is one on which opinions may well differ. I can only say that having given the whole matter repeated and anxious consideration I find myself unable to decide this question in favour of the respondent. But I think that this case is not far from the borderline. If this appeal is allowed, that does not in my judgment mean that in every case where cricket has been played on a ground for a number of years without accident or complaint those who organize matches there are safe to go on in reliance on past immunity. I would have reached a different conclusion if I had thought that the risk here had been other than extremely small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small.

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(60) (1868) L. R. 3 H. L. 330.

This case was also argued as a case of nuisance, but counsel for the respondent admitted that he could not succeed on that ground if the case on negligence failed. I therefore find it unnecessary to deal with the question of nuisance and reserve my opinion as to what constitutes nuisance in cases of this character. In my judgment the appeal should be allowed.

LORD RADCLIFFE. My Lords, I agree that this appeal must be allowed. I agree with regret, because I have much sympathy with the decision that commended itself to the majority of the members of the Court of Appeal. I can see nothing unfair in the appellants being required to compensate the respondent for the serious injury that she has received as a result of the sport that they have organized on their cricket ground at Cheetham Hill. But the law of negligence is concerned less with what is fair than with what is culpable, and I cannot persuade myself that the appellants have been guilty of any culpable act or omission in this case.

I think that the case is in some respects a peculiar one, not easily related to the general rules that govern liability for negligence. If the test whether there has been a breach of duty were to depend merely on the answer to the question whether this accident was a reasonably foreseeable risk, I think that there would have been a breach of duty, for that such an accident might take place some time or other might very reasonably have been present to the minds of the appellants. It was quite foreseeable, and there would have been nothing unreasonable in allowing the imagination to dwell on the possibility of its occurring. But there was only a remote, perhaps I ought to say only a very remote, chance of the accident taking place at any particular time, for, if it was to happen, not only had a ball to carry the fence round the ground but it had also to coincide in its arrival with the presence of some person on what does not look like a crowded thoroughfare and actually to strike that person in some way that would cause sensible injury.

Those being the facts, a breach of duty has taken place if they show the appellants guilty of a failure to take reasonable care to prevent the accident. One may phrase it as "reasonable care" or "ordinary care" or "proper care"—all these phrases are to be found in decisions of authority—but the fact remains that, unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty. And here, I think, the respondent's case breaks down. It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did: in other words, he would have done nothing. Whether, if the unlikely event of an accident did occur and his play turn to another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risks, I do not say, for I do not think that that is a consideration which is relevant to legal liability.

I agree with the others of your Lordships that if the respondent cannot succeed in negligence she cannot succeed on any other head of claim.

Appeal allowed.

Solicitors: *Hall, Brydon, Harvey & Egerton, for Hall, Brydon & Chapman, Manchester; L. Bingham & Co., for Linder, Myers & Pariser, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.)*
1951
Apr. 4, 5, 9, 10;
June 20.

VITKOVICE HORNI A HUTNI TEZIRSTVO . . . APPELLANTS;

AND

KORNER . . . . RESPONDENT.

Practice and procedure—Writ of summons—Service of notice out of jurisdiction—Alleged breach of contract within jurisdiction—Standard of proof as to breach—R. S. C., Ord. 11, *rr.* 1 (*e*), 4.

By R. S. C., Ord. 11, r. 1 (*e*), service out of the jurisdiction of a writ of summons or notice of a writ may be allowed when the action is one brought "in respect of a breach, committed within the jurisdiction of a contract". By r. 4 leave for such service "shall not be

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* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD RADCLIFFE and LORD TUCKER.

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Vitkovice Horni a Hutni Tezirstvo v. Korner.

"granted unless it shall be made sufficiently to appear to the court "or judge that the case is a proper one for service out of the jurisdiction under this Order".

In establishing that a breach of contract was "committed within "the jurisdiction" a plaintiff may fulfil the requirements of the rule while falling short of the standard of proof which must be attained at the trial and he is not obliged to prove the matter beyond all reasonable doubt.

Malik v. *National Bank of Czechoslovakia* (1947), 176 L. T. 136 considered.

Where the judge, applying a wrong standard of proof, refused leave for service out of the jurisdiction on the ground that he was not satisfied that there had been a breach of contract within the jurisdiction, the Court of Appeal rightly reversed his decision since, holding that he had no jurisdiction, he was not purporting to exercise his discretion.

Leave for service out of the jurisdiction having been granted, it was undesirable to require from the plaintiff an undertaking, similar to the form of order in *Thomas* v. *Dowager Duchess of Hamilton* (1886) 17 Q. B. D. 592, that if it appeared at the trial of the action that the salary, in respect of which he claimed, was not payable within the jurisdiction he would not ask for judgment for it, since it was the duty of the judge at the preliminary stage to make up his mind whether the exercise of his discretion was justified.

Decision of the Court of Appeal (sub nom. *Korner* v. *Witkowitzer*) [1950] 2 K. B. 128 affirmed.

Appeal from the Court of Appeal (Bucknill and Singleton, L.JJ., Denning, L.J., dissenting).

The facts were stated by Lord Simonds as follows:—On May 15, 1946, the respondent, Emil Korner, formerly a Czechoslovakian, but since 1947 a naturalized British subject, applied ex parte at Chambers in the King's Bench Division of the High Court of Justice for leave to issue a writ against the appellants, a Czechoslovakian company, claiming certain sums which he alleged to be due to him under two agreements described in these proceedings as the pension agreement and the service agreement, and for leave to serve notice of this writ on the appellants out of the jurisdiction. The application, which was founded on that part of r. 1 of Ord. 11 of the Rules of the Supreme Court which provides that such service "may be allowed by the court . . . "whenever . . . (*e*) the action is . . . brought against a defen"dant not domiciled or ordinarily resident in Scotland or Ireland, "in respect of a breach committed within the jurisdiction of "a contract wherever made", was duly granted by Master Moseley. The appellants entered a conditional appearance to the writ and on January 15, 1947, applied in Chambers under

Ord. 12 that the order of Master Moseley and the writ of summons issued pursuant thereto and all subsequent proceedings should be set aside. The grounds of this application were: "(1.) that there is no jurisdiction to make the said order or to "try the said action; (2.) that if there is jurisdiction the discretion of the court should not . . . be exercised in the intended "plaintiff's favour; and (3.) that the forum conveniens is in the "Republic of Czechoslovakia". Upon this application a number of affidavits were filed, a considerable delay occurred and it was not until November 22, 1948, that Master Grundy made an order setting aside "the order of Master Moseley . . . and the writ of "summons . . . herein and the notice thereof ordered to be served ". . . out of the jurisdiction and the service thereof and all "subsequent proceedings". From this order the respondent appealed to Slade, J., who on July 28, 1949, dismissed the appeal but gave the respondent leave to appeal to the Court of Appeal.

Slade, J., held that he had no jurisdiction because he was not satisfied that there had been a breach of contract within the jurisdiction. He held that since he had no jurisdiction the question of the forum conveniens did not arise. The respondent appealed accordingly, and on February 13, 1950, the Court of Appeal (Bucknill and Singleton, L.JJ., Denning, L.J., dissentiente) allowed his appeal and restored the order of Master Moseley with the following qualification: ". . . the plaintiff "undertaking that if it appears at the trial of the action that "the salary in respect of which the plaintiff claims was not "payable within the jurisdiction the plaintiff will not ask for "judgment for such salary in so far as the same was not payable "within the jurisdiction or interest thereon or damages for breach "of contract to pay the same". From that order the present appellants by leave appealed to the House of Lords.

The claim on the writ was for (1.) 10,913*l*. 14*s*. 11*d*., being pension and interest due under an agreement between the respondent and the appellants, and (2.) 18,840*l*., being salary and interest due under an agreement between the same parties.

The pension agreement, contained in a letter dated January 18, 1929, was made in Czechoslovakia in respect of the pension payable by the appellant company to the respondent, who was then a director, in respect of his services. The calculation of the pension was stated to be in accordance with the articles of the Pensions Institute, its amount being 120,000 Czech crowns. The obligation was expressed in terms of Czechoslovakian currency but contained the provision: "Should the value of the Czech crown "be reduced by more than 10 per cent. of its present gold value, "the difference in value will be made good to you and/or your "survivors in each particular case".

The service agreement sued on was dated March 25, 1938, and was also made in Czechoslovakia. It related to the appointment of the respondent as a consultant, and provided for an annual salary of 2,000*l*. sterling, payable by quarterly instalments in advance.

The appellant company resided in Czechoslovakia but also operated in Central Europe and had international connexions. In an affidavit sworn on April 17, 1946, the respondent stated (inter alia) that when he retired from his position as director he informed the appellant company of his intention to live in America, but that they wished his services after his retirement to be available if required in connexion with their subsidiary companies in Europe. Accordingly he entered into the agreement of March 25, 1938, under which he was entitled to live either in Switzerland, France or England. In or about 1938 he came to England. He stated that at the date of his retirement he was indebted to the appellants in a substantial sum as a result of a loan granted to him by them and he remained their debtor until about 1940, when his entire indebtedness was wiped out and they became indebted to him; he had received no payments from them since he left Czechoslovakia. He stated further that he had no copy of the statute of the Pensions Institute, but that he could say of his own knowledge that there was nothing therein that provided that pensions should be payable in Czechoslovakia. He claimed that apart from the agreement of March 25, 1938, he was entitled to reside where he liked and be paid his pension where he resided, but that after that agreement it was known and contemplated by the appellants that his pension should be paid in one of the three countries therein mentioned.

In a further affidavit sworn by the respondent on June 9, 1946, he stated that when he negotiated the pension agreement of January 18, 1929, he said that he intended to enjoy his pension abroad, and it was expressly agreed by Dr. A. Sonnenschein, the general manager of the appellants, acting on their behalf, that he should receive payment of it in the country in which he might be living at the time it accrued. He stated that he had only remembered this conversation after making his first affidavit. He drew attention to the fact that the heading of his pension account with the appellants confirmed the arrangement which he alleged, since it contained the words "Ausl. Kc.", which meant "foreign "Czech crowns". He contended that, if there was such an agreement with Dr. Sonnenschein, "London, where I was "residing, was the place of performance as a whole and the place "where payment of the debt had to be made, and it was the "obligation of the [appellants] to remit to me a sum repre- "senting at current London rates the gold value of 120,000 "Czech crowns in 1929; if, however, there had been no such "agreement Czechoslovakia was the place of performance as a "whole and London the place where payment of the debt had to "be made and the [appellants] would have been entitled to "effect the conversion at the rates prevailing in Czechoslovakia. "In either case the amount due should have been remitted to me "in London". Dr. Sonnenschein was now dead.

By an affidavit dated December 13, 1949, the respondent said: "Already before my arrival in London in 1938 I had "informed the [appellants] that I would take up my residence "in London and I requested them to pay all sums due to me "to Messrs. N. M. Rothschild & Sons, St. Swithin's Lane, "London".

The respondent also relied on art. 905 of the Czech Civil Code: "The debtor has, if there is any doubt in the case of a "money debt, to transmit the money owed by him at his risk "and cost to the creditor at the latter's residence . . .".

An affidavit filed on behalf of the appellants stated (inter alia), as regarded the pension agreement, that under the pension scheme of their Pensions Institute (the text of which they did not, however, put in evidence) "pensions accrued due to the pensioners, "including [the respondent], and were payable by the [appel- "lant] company in Moravaka Ostrava, Czechoslovakia, in Czech "crowns". As to the service agreement, they said that they were entitled to determine it and did determine it by letter dated June 27, 1940. As to art. 905 of the Civil Code, it was suggested on behalf of the appellants that it did not apply by reason of contrary agreement between the parties.

Affidavits as to Czech law were made on either side by Czech lawyers. It was common ground that the law of Czechoslovakia was the law of the contract.

Beney, *K.C.*, *Clive Burt* and *Ian Warren* for the appellants (defendants). There was no breach of the agreements within the jurisdiction and the order for service out of the jurisdiction was not properly made for the reasons set out in the application under

Ord. 12. Further, the matter was one for the discretion of Slade, J., and there is no ground for holding that his discretion was wrongly exercised.

To come within Ord. 11, r. 1 (*e*), it must appear that there was an obligation to pay in this country alone, for there must be a breach of an obligation which had to be performed within the jurisdiction: see *The Eider* (1); *Comber* v. *Leyland* (2); *The Hagen* (3); and *Tyne Improvement Commissioners* v. *Armement Anversois S/A.* (4). The rules which guide the court in such a case are conveniently summarized in *In re Schintz* (5). There must be complete disclosure and candour on the part of the party seeking the order for service out of the jurisdiction, and if there is any doubt it should be resolved in favour of the foreigner.

As to the application of Ord. 11, r. 4, Slade, J., was right in his understanding of the judgment of Lord Goddard, C.J., in *Malik* v. *National Bank of Czechoslovakia* (6). The court will apply two different standards of proof, for the questions (a) whether there has been a breach of the contract and (b) whether that breach was committed within the jurisdiction, are not on the same footing. On the former, which can be gone into at the trial, the court will be more easily satisfied and can accept prima facie evidence, but on the latter it cannot hold that the relevant fact has been " made sufficiently to appear " unless it is satisfied by proper evidence. A higher standard of proof is set by the inclusion of the word " sufficiently " than would have been required without it. Further, the court cannot do what the Court of Appeal did in throwing the matter over to the trial by means of the condition attached to the leave given. It is for the court which gives leave to decide whether or not the requirements of the rule are fulfilled.

As to the evidence relating to the place of performance, the provision as to the gold value of the Czech crown does not help the respondent. It does not establish that the appellants were obliged to follow him into a foreign country to pay him; they might fulfil their obligation in Czechoslovakia by remitting it to him, which is not the same thing: see *Norman* v. *Ricketts* (7) and *Thairlwall* v. *Great Northern Railway Co.* (8).

The conversation with Dr. Sonnenschein is not admissible in

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(1) [1893] P. 119.
(2) [1898] A. C. 524.
(3) [1908] P. 189.
(4) [1949] A. C. 326, 338, 344–5, 354, 356.
(5) [1926] Ch. 710, 716–7.
(6) (1947) 176 L. T. 136.
(7) (1886) 3 T. L. R. 182.
(8) [1910] 2 K. B. 509.

English law as evidence of a breach of contract within the jurisdiction. This oral understanding cannot have varied the terms of the written pension agreement. It could not be admitted at the trial, and it cannot be admitted now, for the court applies its own rules of evidence even when dealing with foreign contracts: see *Yates* v. *Thomson* (9) and *Bain* v. *Whitehaven and Furness Junction Railway Co.* (10). It is not a question of construing the agreement but of the admissibility of the terms relied on by the respondent. All the terms were contained in the written agreement.

Bremer Oeltransport v. *Drewry* (11) is to be explained on the basis suggested by Lord Goddard, C.J., in *Malik* v. *National Bank of Czechoslovakia* (12). [They also referred to *Rouyer Guillet et Cie.* v. *Rouyer Guillet & Co. Ld.* (13).]

Sir Andrew Clark, K.C., and *Dennis Lloyd* for the respondent (plaintiff). The respondent has made it "sufficiently to "appear" that obligations subsisted under both agreements at the date of the writ, that there had been breaches thereof and that the breaches occurred within the jurisdiction. The word "sufficiently" in r. 4 means sufficiently for the purposes of this rule, viz., of an interlocutory application of this nature. The standard of proof in rr. 1 (*e*) and 4 goes no higher than the need to establish a prima facie case. There is nothing between prima facie proof and proof in law (viz., the quality of evidence necessary to satisfy an unprejudiced mind). The latter can only be achieved by discovery of all the documents and examination of all the witnesses. If and in so far as *Malik* v. *National Bank of Czechoslovakia* (14) decided that the standard of proof in relation to whether or not the breach of contract took place within the jurisdiction is higher than establishing a prima facie case it is wrong and should be overruled. There cannot be two different standards of proof in relation to the same thing, the existence of the contract on the one hand and the place where the breach took place (which depends on its terms) on the other. The plaintiff must establish a good arguable case and that is enough.

Since Slade, J., held that he had no jurisdiction and did not purport to exercise his discretion the Court of Appeal can overrule him. He was wrong in so holding, on the ground that he was not satisfied that there had been a breach of contract within

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(9) (1835) 3 Cl. & F. 544, 586–7.
(10) (1850) 3 H. L. C. 1.
(11) [1933] 1 K. B. 753.
(12) 176 L. T. 136.
(13) [1947] W. N. 5; [1947] 1 All E. R. 244.
(14) 176 L. T. 136.

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the jurisdiction. The respondent proved that he was resident in England at the material times, and Slade, J., failed to give sufficient weight to the following circumstances indicating the intention of the parties that the payments should be made to him in England whilst he was resident there: In the case of the service agreement—(a) the oral agreement whereby he was to reside in Switzerland, France or England; (b) the fact that payment was to be in sterling; (c) the fact that the appellants knew that the respondent was residing in England during the subsistence of the agreement. In the case of the pension agreement—(a) the inclusion of the gold clause in anticipation of the respondent going abroad; (b) the fact that the appellants headed the respondent's account "Ausl Kc.". Further, by Czech law, which is the proper law of the contract, the payments would have to be made to the respondent in the country where he was residing.

Furthermore, as regards the pension agreement, the evidence of the oral agreement made with Dr. Sonnenschein is admissible in law to supplement or interpret the written agreement. It is admissible as a collateral agreement providing for place of payment and to show the intention of the parties: see *Rein* v. *Stein* (15) and *Charles Duval & Co. Ld.* v. *Gans* (16). It does not contradict the written contract.

As to the suggested distinction between remitting money to London from Czechoslovakia and making payment in London it is too fine to avail the appellants in this case. [They referred to *St. Pierre* v. *South American Stores* (*Gath & Chaves*) *Ld.* (17).]

Finally, the forum conveniens is England. The respondent could not get substantial justice in Czechoslovakia, because he would be unable to get counsel to represent him against an enterprise which is now nationalized, and because the judges are not impartial but are influenced by political considerations. A similar position existed in Nazi Germany, particularly where Jews were concerned: see *Oppenheimer* v. *Louis Rosenthal A.G.* (18).

Beney, *K.C.*, in reply. On a prima facie case the matter does not "sufficiently . . . appear" within r. 4, and Slade, J., was entitled so to find in this case. The inclusion of the gold clause need not be given the significance suggested by the respondent. Its object may have been to prevent his being paid in

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(15) [1892] 1 Q. B. 753.

(16) [1904] 2 K. B. 685.

(17) (1937) 42 Com. Cas. 363, 366.

(18) [1937] 1 All E. R. 23, 215.

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a depreciated currency. In the pension agreement there was no question of sterling payments.

Their Lordships took time for consideration.

June 20. LORD SIMONDS. My Lords, in my opinion this appeal should be dismissed. For that reason I intend to confine my remarks within the narrowest limits, for I do not wish in any way to prejudice any issue which may come before the court for determination. [His Lordship stated the facts and continued:]

The grounds of the appellants' appeal remain those founding the application to Master Grundy, with the formidable addition that they now further contend that the Court of Appeal ought not to have interfered with the exercise by the learned judge of a discretion vested in him by the Rules of the Supreme Court. To this the respondent replies that the learned judge did not purport to exercise his discretion in the matter at all, but adopting (as the respondent contends) a wrong construction of the relevant rules, held that he had no jurisdiction to make the order, and adds that the Court of Appeal did exercise its discretion on right principles and therefore that its order should not be disturbed.

My Lords, to me it appears that the crux of the matter lies in the question whether the learned judge did exercise his discretion, and did so on right principles, and having studied his careful judgment with the greatest attention I have come to the conclusion that he did not. The respondent relied on the allegation that there had been a breach or breaches within the jurisdiction of two agreements. It was common ground between the parties that the agreements were made in Czechoslovakia and that the law of that country was "the law of the contract" and that the appellants were there resident. The jurisdiction of the court therefore only arose if the action was brought in respect of a breach of the agreements committed within the jurisdiction and, even if the jurisdiction was established, it was a discretionary jurisdiction which must be exercised with caution and with a bias against invading the sovereignty of a foreign State. These matters were well appreciated by the judge but, as I think, it was in his construction or application of r. 4 of Ord. 11 that he fell into error. That rule, which applies equally to an application under any of the heads of r. 1, provides that: "Every application "tion for leave to serve such writ or notice on a defendant out "of the jurisdiction shall be supported by affidavit or other "evidence, stating that in the belief of the deponent the plaintiff

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" has a good cause of action . . . and the grounds upon which " the application is made; and no such leave shall be granted " unless it shall be made sufficiently to appear to the court or " judge that the case is a proper one for service out of the " jurisdiction under this order ".

The judge concludes his judgment with these words: " For " the reasons I have given, I hold that the court has no jurisdic- " tion in the circumstances of this case, because I am not " satisfied that there has been any breach of either of these " contracts within the jurisdiction, and for the further reasons " that I have given in the case of the service agreement. I base " my judgment solely upon that, and I decide nothing at all, " because it is unnecessary to decide it, upon the question of " what discretion I would have exercised had it become necessary " to consider which was the forum conveniens ". I do not think that the learned judge can have meant that it is only on the question of forum conveniens that it is the duty of the court to exercise a discretion, but, however that may be, it is I think clear that the judge holding that he had no jurisdiction did not purport in any way to exercise his discretion.

Why, then, did the judge hold that the court had no jurisdiction to grant leave? It was, he says, because he was not satisfied that there was a breach within the jurisdiction. This is the meaning which, following certain observations of Lord Goddard, C.J., in *Malik* v. *National Bank of Czechoslovakia* (19), he places on the words of r. 4 " made sufficiently to appear to the court or " judge that the case is a proper one for service out of the " jurisdiction under this order ". But, my Lords, whether the issue is as to the making of a contract " within the jurisdiction " (r. 1 (*e*) (i)) or the making of it by " an agent trading or residing " within the jurisdiction on behalf of a principal trading or " residing out of the jurisdiction " (r. 1 (*e*) (ii)) or as to the law which by its terms or by implication governs it (r. 1 (*e*) (iii)) or as to the place where the alleged breach has been committed, the obligation of the plaintiff is not to " satisfy " the court that he is right but to make it " sufficiently appear . . . that the case is a " proper one for service out of the jurisdiction under this order ".

As Lord Davey said in *Chemische Fabrik Vormals Sanoz* v. *Badische Anilin und Soda Fabriks* (20), " This " (i.e., r. 4) " does " not, of course, mean that a mere statement by any deponent " who is put forward to make the affidavit that he believes that

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(19) 176 L. T. 136.

(20) (1904) 90 L. T. 733, 735.

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"there is a good cause of action is sufficient. On the other hand "the court is not on application for leave to serve out of the "jurisdiction . . . called upon to try the action or express a "premature opinion on its merits". Yet, as I read the judgment of the judge (and here, too, I think, he founds on the observations of Lord Goddard in *Malik's* case (21)), he adopted a standard of proof in regard to the place of breach which in effect amounted to a trial of the action or a premature expression of opinion on its merits. For example, one reason, but not the only reason, why the respondent alleged that there was a breach within the jurisdiction was that, as he swore in an affidavit made, it is true, somewhat late in the proceedings, there was an express agreement made between himself and a representative of the appellants that payment under the pension agreement should be made in London if he was resident in London. It could not possibly be said that the allegation was on the face of it false or frivolous; on the contrary Singleton, L.J., in the Court of Appeal, said the court ought to accept it (22). At the highest it could be said that it was open to doubt until it had been tested by cross-examination and examined in the light of any other evidence that might be adduced at the trial. Therefore when the judge said that he was not "satisfied" that there had been a breach within the jurisdiction, he can only have meant that the respondent had not proved that fact beyond all reasonable doubt. But that is something quite different from the burden which the rule imposes, for a plaintiff can make it sufficiently appear that the case is a proper one for service out of the jurisdiction while falling short of the standard of proof which must be attained at the trial. If it were not so, it would become the duty of the court to do just what Lord Davey said was not its duty, viz., to try the action upon the preliminary application.

It is, no doubt, difficult to say precisely what test must be passed for an applicant to make it sufficiently appear that the case is a proper one. I do not wholly like the expression "a "prima facie case", for, where leave to serve has been given ex parte under Ord. 11 and application is then made under Ord. 12 to set the proceedings aside, a conflict may arise in which the question is not so much whether a prima facie case has been made out as whether upon all the materials then before him, the judge is of opinion that the case—I can find no better word—is a

(21) 176 L. T. 136.

(22) [1950] 2 K. B. 128, 153.

proper one to be heard in our courts. The description "a good "arguable case" has been suggested and I do not quarrel with it. But for the purpose of this appeal it is sufficient to say negatively that the learned judge fell into error in thinking that the court had no jurisdiction to grant leave because he was not "satisfied" that there had been a breach within the jurisdiction.

Upon this footing it was clearly competent for the Court of Appeal to review the judge's order and in the exercise of its discretion to make such order as it thought fit. In that court Bucknill, L.J., giving, as I think, the proper force and effect to r. 4 of Ord. 11, entertained jurisdiction and restored the order of Master Moseley. I see no ground for saying that he exercised his discretion on wrong principles. On the contrary, if the matter were res integra, I should have exercised it in the same way. Singleton, L.J., reached the same result but, as I venture to think, used, perhaps per incuriam, language which is not accurate, for he too suggests that there is a special standard of proof required where it is alleged that a breach occurred within the jurisdiction; he must, says the Lord Justice (23), "show it to "the satisfaction of the court". If this expression has the meaning which Slade, J., attributed to it, it is not what the rule requires. But inasmuch as the Lord Justice concluded that the respondent had passed the test, whatever it was, it followed that the jurisdiction of the court was founded, and, this being so, the Lord Justice in the exercise of his discretion allowed the appeal. I see no reason for saying he exercised it wrongly. Denning, L.J., would have dismissed the appeal, but, as I think, he, too, adopted the test which it was assumed had been laid down by Lord Goddard in *Malik's* case (24), and upon that footing was constrained to express an opinion on many questions on which any opinion must be premature until the trial of the action. On these and other matters I have abstained from giving my own opinion, for I am conscious that I have not all the materials which will be available at the trial.

At the opening of this opinion I said that the Court of Appeal had by its order made a qualification on the order made by Master Moseley. That arises in this way. There were, as I have said, two agreements of which breaches were alleged. In regard to one of these, called the salary agreement, Bucknill, L.J., felt more doubt whether there had been a breach within the jurisdiction, and, accordingly, though I think Singleton, L.J., somewhat

(23) [1950] 2 K. B. 128, 156.

(24) 176 L. T. 136.

unwillingly concurred in this, the court required from the respondent an undertaking which was embodied in the order, that if it appeared at the trial of the action that the salary, in respect of which the respondent claimed, was not payable within the jurisdiction, the respondent would not ask for judgment for such salary in so far as the sum was not payable within the jurisdiction or interest thereon or damages for breach of contract to pay the same. In this the court followed the precedent of *Thomas* v. *Dowager Duchess of Hamilton* (25). So far as I am aware it has rarely, if ever, been followed since, and I do not think that it is a desirable form of order. But the respondent has not cross-appealed, and I think in the circumstances that it would not be right to deprive the appellants of whatever advantage they may get from it. It will be sufficient therefore if the House dismisses this appeal, and I move accordingly.

My Lords, my noble and learned friend LORD NORMAND, who is unable to be here, has asked me to say that he concurs in the opinion that I have read.

LORD OAKSEY. My Lords, I agree that this appeal should be dismissed. I do not think it possible to distinguish between the standard of proof required under r. 1 (*e*) (i), (ii), (iii), and the other grounds on which an application is made under the rule. The court must decide in every case whether it is a proper case for service out of the jurisdiction. It is true that so far as that decision is concerned it is final and will not be litigated again at the trial, but the fact that it is an interlocutory decision decided upon affidavit evidence and the words " unless it shall be made " sufficiently to appear to the court " indicate that it is equally on all points a discretionary matter.

It is clear, I think, that Slade, J., adopted different standards of proof as a matter of law in regard to the matters which he had to decide (see especially the Appendix to the printed case, p. 21, F.G., p. 23, D., p. 24, C.D.), and I am therefore of opinion that the Court of Appeal were right in holding that he had misdirected himself and that it was necessary for them to exercise their discretion under the rule. The majority of the Court of Appeal were of opinion that this is a proper case for service out of the jurisdiction, and I do not think the exercise of their discretion ought to be interfered with. Even if there were only the slightest evidence as to the breach of the pensions agreement having been committed within the jurisdiction, the evidence as to forum conveniens is, in my opinion, such as to make it sufficiently to appear that the case is a proper one for service out of the jurisdiction.

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(25) (1886) 17 Q. B. D. 592.

LORD RADCLIFFE. My Lords, I think that the problems of construing and applying the provisions of Ord. 11 of the Rules of the Supreme Court have been invested with something more of mystery than they properly require. Some of the difficulties that have arisen may be traced to a tendency to treat r. 1 of the Order as if it were not part of a scheme that included r. 4 as well; whereas, as I conceive, the key to the procedure lies in a proper construction of r. 4. Service out of the jurisdiction is, of course, an exceptional measure. The ordinary principles of international comity are invaded by permitting it, and that quite apart from the question whether judgment will or will not ultimately be given against the person served. It is only natural therefore that the courts should approach with circumspection any request for leave to issue a writ against such a person. Rule 1 defines the circumstances in which a judge may in his discretion allow such a writ to be served; but, if r. 1 stood alone, the judge would be left in the dilemma of choosing between asking no more of the applicant than his assertion that the action he desires to bring involves one or more of the qualifying conditions (which would be to ask less than the language of the rule seems to require), and asking the applicant to establish beyond reasonable doubt by appropriate evidence that the necessary conditions are in fact fulfilled (which would be in effect to try the case ex parte before it had been heard).

Neither alternative presents itself to me as reasonable, and I think that the measure of the judge's duty must be found within the words of r. 4. This rule prescribes the procedure that is to be observed on every application under the Order, and it is well to recall that the Order is dealing from first to last with what must be by its nature an ex parte application. There must be "affidavit or other evidence, stating that in the belief of the "deponent the plaintiff has a good cause of action". The evidence must show "in what place or country such defendant ". . . . may be found, and whether such defendant is a British "subject or not"; and, finally, it must disclose "the grounds "upon which the application is made". I cannot feel any doubt that the word "grounds" is adequate to cover the alleged facts which bring the case within r. 1 as well as any additional facts which are relevant to the exercise of the court's discretion, and this requirement by itself seems to me to show that the judge is expected to exercise some more critical function than that of merely accepting the statement on affidavit that the plaintiff is believed to have a good cause of action. Indeed, that belief would be quite consistent with the absence of any of the conditions necessary to justify service out of the jurisdiction.

The last direction contained in r. 4 is in form a prohibition—"no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this Order"—but I suggest to your Lordships that it is from these words, and these words alone, that it is possible to ascertain what measure of proof the judge should require before deciding that he is authorized to make an order under this procedure. It must sufficiently appear to him that it is a proper case. The phrase is a composite one and it is not elucidated by taking it to pieces; but it seems to me clear that the use of the word "sufficiently" in this context shows that it is not necessary that the judge should be satisfied beyond reasonable doubt as to the existence of the qualifying conditions. Further, a case does not sufficiently appear to be a proper case for the purposes of this Order unless on consideration of all admissible material there remains a strong argument for the opinion that the qualifying conditions are indeed satisfied.

My Lords, it is thus that I construe this Order, and I do so with all respect to the views of those who have much greater experience than I have in the practical task of applying it. I turn now to see how the construction that I have adopted accords with the views of the judges who have dealt with this matter in the courts below. Strictly speaking, they were not dealing with an application under Ord. 11. They were dealing with an application under Ord. 12 to discharge an order already made. But I think that the principles that govern the making of an Order must govern a decision to revoke it when made. Slade, J., in his most lucid judgment has divided his responsibility between that of requiring no more than a prima facie case for the existence of a contract and of a breach of it and that of requiring to be satisfied on the evidence that a breach has in fact taken place within the jurisdiction.

I think that there are two criticisms to be made of this view of the law. One is that the Order gives no ground for drawing a distinction between the standard of proof necessary to establish one of its requirements and the standard of proof necessary to establish another; nor have I myself been able to work through the logical process of being satisfied as to where a breach of contract had taken place without being at any rate as much satisfied that the contract existed and had been broken.

The other criticism is that "a prima facie case" puts the standard of proof somewhat too low, while to be "satisfied" puts it somewhat too high. These are, of course, only words and I do not wish to chop their meaning overfine. But I prefer the test of a strong case for argument that I have just suggested. A prima facie case may not be much short of this when the application is, as it always is under Ord. 11, ex parte; but when the next stage is reached and an application is made to set aside the service after conditional appearance, which is the form of application that your Lordships are dealing with here, I confess that I do not know what exactly is conveyed by "a prima facie "case". There is voluminous affidavit evidence on both sides, some of it conflicting, and the affair seems to me at this stage to have passed beyond the point at which anything can properly be said to possess a prima facie validity. And if, at such a stage, a judge requires to be satisfied as to the existence of one or more of the qualifying conditions before he regards himself as free to act, I think that he is requiring that all reasonable doubt should have been eliminated from his mind. I think that that is to go too far in favour of the defendant and to give him more than he can be entitled to on any general principle.

In deciding as he did, the judge thought that he was applying a principle laid down by the Court of Appeal in *Malik* v. *National Bank of Czechoslovakia* (26). I dare say that he was right in thinking that that case did contain a statement of principle that was binding upon him; but, if it did, I think that the principle was not rightly expressed and I have given my reasons for so thinking. No sufficient purpose would be served therefore if I were to scrutinize the language that was used by the court in the *Malik* case (26), nor would it be of any real assistance to your Lordships to observe upon some of the phrases that have been used in this case and in that upon previous occasions. The Order which is now under review is concerned essentially with a matter of procedure and in all but exceptional cases that procedure ends naturally and the more happily with an exercise of his discretion by the judge in chambers. It so happens that on this occasion a divergence of views in the courts below has left your Lordships with the duty of analysing the language of the Order and endeavouring to state with precision what are the principles according to which it should be applied. I do not myself think that its language presents any very great difficulty so long as it is approached with two main considerations in mind. The first is that authority to sanction the issue of a writ outside the jurisdiction is not lightly to be assumed. The second is that both the nature of the case and the wording of r. 4 itself show that the existence of the conditions that govern the authority cannot be ascertained with the same finality as would be appropriate at a trial, in which evidence and argument could be exhaustively deployed.

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(26) 176 L. T. 136.

My Lords, on the substance of the appeal I agree with the decision of the majority of the Court of Appeal, though I am not altogether in agreement with their respective constructions of the Order or of their methods of applying it. But what determines me is that, when the evidence is weighed, there remains a strong argument for the respondent's contention that in respect of each of his heads of claim there has been a breach within the jurisdiction.

I will take first the service agreement, and I do not think it desirable at this stage to do more than indicate briefly to your Lordships what are the considerations that have weighed with me. It looks as if there were some instalments due under that agreement that have never been paid or set off against a debit on account. The payments were stipulated to be due in sterling and they were agreed upon at a time when the respondent was going to leave Czechoslovakia, was not going to leave Europe, and was expected to reside in England, France or Switzerland. Add to this that it does not seem to be disputed between the Czechoslovakian lawyers that, failing contrary agreement, the appellants as debtors would have to make payment to the respondent as creditor wherever he might be residing and that the respondent has deposed that before 1938 he had nominated Rothschilds' bank in London as the place of payment, and I think that he is left at this stage with a good case for his argument that there has been a breach of this agreement within the jurisdiction.

The pensions agreement stands on rather a different footing. The obligation was expressed in terms of Czechoslovakian currency and the agreement was made in Czechoslovakia in respect of service to and a pension from the appellants, a Czechoslovakian concern. But all these circumstances are perhaps not very strong to determine the place of payment, when it is recalled that pension payments are intended for those who have severed their connexion with the company, their service being over. A company operating in Central Europe, with international connexions, might well anticipate that its pensioners would be found living outside the country and make provision accordingly. The appellants have deposed that under the pensions scheme pensions accrued due and were payable in Czech crowns in Moravaka Ostrava. The document which sets out the terms of the scheme has not been put in evidence and the appellants have only themselves to thank, as I see it, that we are not in a position to study it.

However that may be, the respondent's rights do not depend directly on the general scheme but on the promise that was made to him in the letter dated January 18, 1929, which is Exhibit E.K. 1 in the proceedings. By this letter the appellants have undertaken that he should have made up to him any difference in value if the value of the Czech crown came to be reduced by more than 10 per cent. of its then gold value. Such an undertaking does not bear directly on the question where payment was to be made; but it is only consistent with the assumption that the parties were at that time contemplating that the respondent would or might require to be paid outside Czechoslovakia. It is, I think, significant that the appellants kept his account with them under the heading "Ausl. Kč". It suggests strongly that they recognized that he was entitled to be paid abroad. The explanation which the appellants' witness has offered as to the import of that entry seems to me in itself inexplicable. On the whole, therefore, the respondent seems to me to have made out a good argument for the view that what appears to be the general rule of Czechoslovakian law should be applied and that his residence in this country entitles him to be paid in this country.

Your Lordships will observe that I have hitherto made no reference to the special assurance which the respondent says that he received from the late Dr. Sonnenschein at the time of the negotiation of his pension agreement. That assurance was first introduced into this case by the respondent's further affidavit of June 9, 1948. I have not taken it into account, much as it influenced the views of the majority of the Court of Appeal. I do not think it necessary to do so, having regard to the other considerations to which I have already alluded; and, for my part, I would not feel altogether happy at giving weight at this stage of the proceedings to an oral assurance made in 1929 and forgotten so long and so profoundly by the respondent, who now, alone, can depose to it. The distinction between remitting moneys from Czechoslovakia to be received in London and making payment in

London out of resources provided from Czechoslovakia is itself a fine one, and I could feel no sufficient confidence that such an assurance, so recollected, would enable me to choose the right alternative.

If one comes to the point of concluding that upon this application it has been made sufficiently to appear that the breaches complained of took place within the jurisdiction, the case presents itself to me as in all other respects a proper one for leave to be given for service abroad. I regret the introduction of an undertaking by the respondent into the order made by the Court of Appeal. To exact such an undertaking is to revive the form of order made in *Thomas* v. *Dowager Duchess of Hamilton* (27). I think that the objection to such a practice is that it is not really within the spirit of Ord. 11. It is the duty of the judge at that preliminary stage to make up his mind whether the evidence and arguments justify the exercise of his discretion. If they do, there is no reason why the plaintiff should be further embarrassed by an undertaking of this kind; but the judge must make up his mind before he exercises his special authority to allow service in another jurisdiction, and, if he cannot feel sufficient confidence as to the existence of the required conditions, it is to evade the issue to allow proceedings to go ahead and to defer until the trial what should have been the preliminary determination of the matter.

LORD TUCKER. My Lords, in setting aside the order for service of notice of the writ out of the jurisdiction in the present case Slade, J., dealt with the application by following, as he thought, the line indicated as appropriate to such cases by Lord Goddard, C.J., sitting as a member of the Court of Appeal in *Malik* v. *National Bank of Czechoslovakia* (28). The first and all-important question in this appeal is whether in so doing he misdirected himself and thereby left the Court of Appeal free to exercise its own discretion as it thought fit. If he did not misdirect himself then his decision should stand, since the operation of the machinery of Ord. 11 is for the master and judge in chambers, and it is in my view clear that there was ample material in the present case upon which a judge in chambers in the exercise of his discretion could have decided either to allow or to refuse service out of the jurisdiction. Indeed, the difference of judicial opinion as to the facts and inferences which should be drawn from

(27) 17 Q. B. D. 592.

(28) 176 L. T. 136.

the evidence which has manifested itself at different stages in this appeal is in itself sufficient to show how different judges may quite properly take different views as to the manner in which they would exercise their discretion.

The language used by Lord Goddard and applied by Slade, J., was as follows (29): " The first thing that the plaintiff has to " show is that he is bringing his action in respect of a breach " committed within the jurisdiction. I say at once that I cannot " accede to the part of Mr. Montagu's argument in which he says " that the question as to whether there is a breach, and the " question whether it is committed within the jurisdiction, stand " exactly on the same footing. The court in these cases must " approach the matter on the footing of the assumption that there " has been a breach, and then they have to consider whether or " not the breach has been committed within the jurisdiction, " because it is only if the breach has been committed within the " jurisdiction that this court can entertain the case, or allow the " writ to be served out of the jurisdiction. The case to which " Mr. Montagu referred as supporting his argument that the two " matters are on exactly the same footing is a case in the Privy " Council of *Hemelryck* v. *William Lyall Shipbuilding Co.* " *Ld.* (30); but I do not think that that case goes anything like the " length that he asks us to go, for this reason. No doubt, when " the court is considering whether it will give leave to serve notice " of the writ out of the jurisdiction, the court wants to see that " there is at least an arguable case. If it can see, by what " appears on the affidavits, that the case put up is a perfectly " groundless or frivolous one, and one in which there is no substance at all, the court can refuse to give leave because they " can say: ' Whether you allege a breach within the jurisdiction " ' or not, you are putting up a case which on the face of it is " ' groundless, and we are not going to allow notice of a writ to " ' be served in any case wherever the breach took place '. The " action has to be in respect of the breach of contract. The court " on this application is not going to inquire whether the case is " one in which the plaintiff must necessarily succeed; they will " not concern themselves at the stage of the application for leave " as to whether it is a case in which the plaintiff must succeed, " but, if they see, on the face of the proceedings, that it is a " groundless action, no doubt they will not allow an order to go " for service out of the jurisdiction. As a general rule, the court

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(29) 176 L. T. 136, 137.

(30) [1921] 1 A. C. 698.

"will approach the case on the footing that the plaintiff has got "a case: that is to say, a case which can be properly put before "the court and argued, and one in which, if the court finds in "accordance with the facts alleged by him, the result would "probably be judgment for him. But when it comes to the "question whether a breach has been committed within the "jurisdiction, that is another and very different proposition. "We have been reminded by Sir Valentine Holmes during the "course of the argument that r. 4 of Ord. 11 expressly says that: "'. . . no such leave shall be granted unless it shall be made "'sufficiently to appear to the court or judge that the case is a "'proper one for service out of the jurisdiction under this order'. "Therefore, the court has to be satisfied upon the affidavits in "this case that the action is brought in respect of a breach "committed within the jurisdiction".

Before considering this language it is to be remembered that it has frequently been laid down that this jurisdiction is to be exercised with great care and that any doubts should be resolved in favour of the foreigner. (For example, see *per* Farwell, L.J., in *The Hagen* (31).)

As I read Lord Goddard's words, he is saying no more than that before it is "made sufficiently to appear to the court" that notice of a writ should be served out of the jurisdiction the court will require more cogent evidence with regard to those matters which may not thereafter be the subject of any further investigation than in the case of those issues which will necessarily be fought out at the trial. Take for example a case of tort under r. 1 (*ee*). Suppose it is sought to serve notice of a writ out of the jurisdiction in respect of a collision at sea alleged to have taken place within the jurisdiction, the court will not be concerned to enter into the question of the negligence of the defendants provided the affidavits disclose a case which appears to merit consideration at the trial, but, assuming negligence, it should in my opinion require cogent evidence pointing to a strong probability that the collision occurred within the jurisdiction before it will allow service out of the jurisdiction, this being an issue which may never arise at the trial, and which, if it does arise and if it be proved that the collision took place outside the jurisdiction, will not divest the court of the jurisdiction it has wrongly assumed. *The Fagernes* (32) is an example of such a case.

In dealing with cases of contract it is more difficult to define

(31) [1908] P. 189, 201.

(32) [1927] P. 311.

the position with precision, though no difficulty, I think, arises in practice. If the plaintiff is relying on a breach of contract within the jurisdiction it may be necessary, as in the present case, to show the existence of a contract containing as one of its terms a provision express or implied for payment in England. It is then said: How can it be true to say that the court will readily assume the existence of *the* contract but will require cogent evidence that the breach took place within the jurisdiction when this depends upon what the terms of the contract were? How, it is said, can you have different standards of proof of one and the same thing?

My Lords, this appears to me a mere question of words. In such a case as the present there is no dispute that contracts had been made for the payment, in one case of salary, and in the other pension. The judge was not concerned to inquire closely to ascertain all the terms of these contracts or whether or not the defendants might have a sufficient set-off to extinguish their alleged indebtedness thereunder, but he was, as I think, concerned to inquire and to satisfy himself that the probabilities of the case were strongly in favour of the plaintiff's contention that the contracts contained a term providing for payment in England.

I do not think it is quite accurate to say that there are different standards of proof required in each case. The rule is dealing with an interlocutory application. There is no issue which has to be "proved" in the sense that matters in issue require to be proved at a trial. It has to "be made sufficiently to appear to the . . . "judge that the case is a proper one", etc., and this involves that it must be made sufficiently to appear to him that there has been a breach within the jurisdiction, and this may involve it being made sufficiently to appear to him that the contract relied upon contained a term requiring payment in England. I cannot think that when Lord Goddard used the words "the court has "to be satisfied", he meant anything more than what I have endeavoured to express above. "Made sufficiently to appear" is an awkward expression which can, I think, be conveniently and accurately expressed as "satisfied" without it being thought that he thereby meant that it had to be "proved" as issues require to be proved at a trial.

My Lords, I agree with the analysis of Ord. 11 which has been made by my noble and learned friend Lord Radcliffe and his statement of the principles according to which it should be applied, but I find nothing therein inconsistent with the view I have endeavoured to express that the cogency of the evidence required to justify an order for leave to serve out of the jurisdiction may vary with regard to the different matters which fall to be considered before such an order can be made.

I feel considerable doubt whether Slade, J., misdirected himself in the present case, but I am not prepared to dissent from the conclusion reached by your Lordships that he used language calculated to give the impression that he considered that a breach within the jurisdiction had to be proved to the same extent as matters in issue must be proved at a trial, and that he appeared to think the exercise of his discretion would only be required with regard to the forum conveniens. This being the position, it was open to the Court of Appeal to exercise their own discretion, and no grounds exist for disturbing the exercise of that discretion by the majority of the court.

I have, however, I think already sufficiently indicated that I respectfully feel unable to agree with the view expressed by Bucknill, L.J., towards the end of his judgment where he says (33): " I think that the concluding words of r. 4, applicable as they are " to all the instances of r. 1, only require that in each case, and " on every material part of it, the court must not act merely on " vague statements such as statements based on information and " belief, or on statements which are obviously untrue, or, as " contended in the *Tyne Commissioners* case (34), on statements " that the law as to the liability of the party sued here is difficult " and complicated and that the matter had better be left to " be decided by the trial judge. Having regard to the general " principles laid down in *The Hagen* (35), that will not suffice. " In each case the plaintiff must, as I think, make out a prima " facie case, and if that case is based on facts which are put in " issue, nevertheless leave should be given ". If this is the test it would seem that an ex parte order for service out of the jurisdiction can seldom, if ever, be set aside on further evidence if a prima facie case has been shown on the original application. I agree that the introduction of an undertaking by the respondent into the order in the form used in *Thomas* v. *Dowager Duchess of Hamilton* (36) is undesirable.

For the reasons I have stated I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Wright & Bennett; Rubinstein, Nash & Co.*

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(33) [1950] 2 K. B. 128, 151.
(34) [1949] A. C. 326.
(35) [1908] P. 189.
(36) 17 Q. B. D. 592.

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INSURANCE — "*Accident*" *policy — Exception of* "*fire*"—*Bleacher tank—Tank door blown off by internal pressure—Escape of gas—Explosion—Unexplained source of ignition—Explosion damage due to* "*accident*" *and not to* "*fire*".

Canada—Practice and procedure—Assignment of right of action—Continued right to sue—"*Interest*" *therein—*"*Signification*"*—Code of Civil Procedure, art.* 77*—Civil Code, s.* 1571.

Boiler Inspection and Insurance Company of Canada *v.* Sherwin-Williams Company of Canada Ld. - - - - - **J. C. 319**

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LANDLORD AND TENANT—*Rent restriction—Flat let alone—Subsequently let with garage as separate dwelling—Standard rent—Effect of letting with garage—Rent and Mortgage Interest Restrictions Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 3.

Langford Property Co. Ld. *v.* Batten **H. L. (E.) 223**

2. —— Rent Restriction. *See* Eastern Africa.

MALTA—*Landlord and tenant—Jurisdiction—Lease of cinema, equipment and goodwill Claim to recover possession—Business concern—Competency of ordinary courts—Reletting of Urban Property (Regulation) Ordinance, No. XXI of* 1931, *s.* 2.

Joseph Zammit Bonett *v.* Joseph Axisa **J. C. 62**

MASTER AND SERVANT—*Accident to servant—Safe system of work—Servant with only one eye—Other eye injured—Risk of greater injury—Master's obligation.*

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2. —— *Servant of the Crown—Military law—Uniformed soldier—Presence on civilian lorry with illicit cargo—Money reward—Confiscation by military authorities — Court-martial conviction—Conduct prejudicial to good order and military discipline—Claim to recover money—Petition of right—Relation of Crown to soldier.*

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MINES — *Statutory duty — Breach — Shot-firing—Mine-worker injured by explosive—Liability of mine-owner or manager—Common employment — General Regulations*, 1913, *made under s.* 86 *of the Coal Mines Act*, 1911 (*St. R. & O.* 1913, *No.* 748), *reg.* 1—*Explosives in Coal Mines Order*, 1934, *made under s.* 61 *of the Coal Mines Act*, 1911 (*St. R. & O.* 1934, *No.* 6), *arts.* 2 (*e*), (*h*); 6 (*a*)—*Coal Mines Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 61, 74, 75, 86, 89, 90.

Harrison *v.* National Coal Board **H. L. (E.) 737**

MORTGAGE. *See* Estoppel.

NATIONAL INSURANCE. *See* Workmen's Compensation.

NATIONALIZATION — *Road transport — British Transport Commission — London Transport Executive—Scheme made by commission and approved by Minister—Functions delegated to executive—Activities transferred from London Passenger Transport Board—Ancillary activities—New omnibus service—Route approval by licensing authority—No road service licence—Powers of executive—London Passenger Transport Act*, 1933 (23 *Geo.* 5, *c.* 14), *s.* 15—*Transport Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 2, *sub-s.* 1; *ss.* 12, 14, *sub-s.* 4; *s.* 65, *sub-s.* 1.

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NEGLIGENCE — *Motor vehicle — Running-down accident to pedestrian—Plea of contributory negligence — Whether duty owed by injured party to party sued—Duty to act carefully—Death of injured party—Damages—Quantum.*

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2. —— *Nuisance—Highway—Fall of elm tree—Injury to user of highway—Duty of occupier of land—Liability.*

Caminer *v.* Northern and London Investment Trust Ld. - - **H. L. (E.) 88**

3. —— *Nuisance—Personal injuries—Cricket club ground—Ball hit into highway—Pedestrian on highway injured—Liability.*

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4. —— *Personal injuries—Invitor and invitee—Duty of invitor—Damage from "unusual danger" — Meaning — Ship repairer occupying ship—Responsibility for adequate staging—Liability to injured employee of co-contractor.*

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5. —— Accident to servant. *See* Master and Servant.

NUISANCE—Cricket ball. *See* Negligence.

2. —— Highway. *See* Negligence.

PATENT—*Practice and procedure—Action for infringement and counter-claim for revocation —One claim only held valid and infringed—Case remitted to Chancery Division from House of Lords—Direction "to determine "what, if any, relief should be granted . . . "in accordance with s. 32*A *of the Patents and Designs Acts,* 1907–1946"—*Jurisdiction to entertain application under s.* 22—*Patents and Designs Acts,* 1907–1946, *ss.* 22, 32A.

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PRACTICE AND PROCEDURE—*Writ of summons—Service of notice out of jurisdiction —Alleged breach of contract within jurisdiction —Standard of proof as to breach—R. S. C., Ord.* 11, *rr.* 1 (*e*), 4.

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PRINCIPAL AND AGENT—*Agency contract —Commission—Basis and rate left to discretion of principal—Claim for account and payment of commission—Court incompetent to grant relief claimed.*

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REVENUE — *Surtax — Direction that company's income be treated as members' income —Apportionment to member—Married woman living with husband—Assessment to surtax in respect of income so treated—Assessment made on husband of member—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *General Rules Applicable to All Schedules, r.* 16—*Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-s.* 1.

Inland Revenue Commissioners *v.* Barclays Bank Ld. Same *v.* Latilla-Campbell. Same *v.* Mayo - - - **H. L. (E.) 421**

2. —— *Surtax—Settlement—"Body corporate connected with the settlement"—Company making payments on behalf of settlor—Sums "paid directly or indirectly . . . to the "settlor"—Payment made "by way of "loan"—Sums chargeable to surtax—Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 40, *sub-ss.* 1, 3, 5; *s.* 41, *sub-s.* 4 (*e*).

Potts' Executors *v.* Inland Revenue Commissioners - - - **H. L. (E.) 443**

ROAD TRAFFIC. *See* Nationalization—Road Transport.

SCOTLAND—*Emergency legislation—Superior and vassal—Right in security—War damage to land—Value payment and interest—Division among superior, vassal and bondholder—Period between date of damage and date of payment—Rights of parties—War Damage Act,* 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 10, 24, 25; *Sch. IV, Part II.*

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SHIPPING—*Salvage—Ocean towage—Indian Ocean to United Kingdom—Original salvor substituted for another at Aden—Place of safety—No facilities for repair to disabled ship or tug services practicable abroad—Towage continued to Falmouth—Whether salvage or towage after Aden—Liability of cargo-owners to contribute to salvage award.*

Troilus (Cargo Owners) *v.* Glenogle (Owners, Master and Crew) **H. L. (E.) 820**

2. —— *Ship—Stranding—Channel approaching harbour—Obstruction by silt—Negligence of harbour authority—Failure to warn pilot and master—Liability of harbour authority—Negligence of compulsory pilot—Responsibility of shipowner—Harbours, Docks and Piers Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 27), *s.* 74 —*Pilotage Act,* 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *s.* 15.

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3. —— *Ship repairs—Not to be carried out "except under the authority of a licence "granted by the Admiralty"—Oral permission—Assumption of authority by government officer—Whether subject protected if authority exceeded—Restriction of Repairs of Ships Order*, 1940 (*St. R. & O.*, 1940, *No.* 142), *para.* 1.

HOWELL *v.* FALMOUTH BOAT CONSTRUCTION CO. LD. - - - - - **H. L. (E.) 837**

SINGAPORE—*Criminal Law—Finance Regulations — Validity — Military Administration Proclamation*, 1945—*Singapore Colony Order in Council*, 1946 (*S. R. & O.* 1946, *No.* 464), *s.* 2, *sub-s.* 1; *s.* 40, *sub-s.* 1; *s.* 42, *sub-s.* 1; *s.* 49—*Indemnity and Validating Ordinance* (*No.* 1 *of* 1946), *s.* 5.

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WILL—*Construction—Bequest of residue—On trust for testator's two daughters for life in equal shares with remainder in fee to their issue in equal shares—Trust of one moiety for each daughter with remainder to her issue.*

MCDONNELL *v.* NEIL - - - **J. C. 342**

WORKMEN'S COMPENSATION—*National insurance—Transitional provisions—Industrial disease—Workman's claim for both injury benefit and compensation—Validity—Workmen's Compensation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 84), *ss.* 1, 9, 43, *Sch. III—National Insurance (Industrial Injuries) Act*, 1946 (9 & 10 *Geo.* 6, *c.* 62), *ss.* 1, 55, 89, *sub-s.* 1, *proviso* (*a*).

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